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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, California Medical Association, *et al.*, appeal from the decision of May 23, 1980, by the United States Court of Appeals for the Ninth Circuit, sustaining the constitutionality of certain provisions of the Federal Election Campaign Act of 1971, Public Law 92-225, 2 U.S.C. §§ 431, *et seq.*, as amended by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, and the Federal Election Campaign Act Amendments of 1976, Public Law 94-283 ("the Act" or "FECA").

OPINIONS BELOW

The majority opinion by the court of appeals, along with the concurring and dissenting opinions by Judge Choy and Judge Wallace, are printed as Appendix A hereto. They have not yet been officially reported.

JURISDICTION

These proceedings were commenced by appellants[1] as an action for declaratory and injunctive relief to preclude enforcement of certain provisions of the Act as repugnant to the Constitution. The action was originally filed in the United States District Court for the Northern District of California. The district court, acting pursuant to 2 U.S.C. § 437h(a), certified certain constitutional questions to the United States Court of Appeals for the Ninth Circuit, for a hearing en banc on an expedited basis. (Appendix C.) The certified questions were briefed and argued before the court sitting en banc. The opinions of the court of appeals were filed on May 23, 1980. (Appendix A.) On June 3, 1980, appellants filed in the court of appeals a Notice of Appeal to this Court. (Appendix D.)

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[1]Appellant, California Medical Association ("CMA") is an unincorporated membership organization, whose members consist of approximately 25,000 physicians located in California. Appellant, California Medical Political Action Committee ("CALPAC") is a political committee sponsored by CMA and registered with the Federal Election Commission. Appellant, Sidney E. Foster, M.D., is a member of CMA and CALPAC, and at all times pertinent hereto was treasurer of CALPAC. Appellant, E. Kash Rose, M.D., is a member of CMA and CALPAC. Dr. Rose has held offices in both organizations, and is a past-president of CMA and a former chairman of CALPAC. Both Dr. Foster and Dr. Rose are registered voters eligible to vote in presidential elections.

This Court has jurisdiction of this appeal pursuant to 2 U.S.C. § 437h(b) (1980), which states:

> "*Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the Court of Appeals."

Buckley v. Valeo, 424 U.S. 1, 6-13 (1976), sustains jurisdiction here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal concerns the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.,* as amended by the Federal Election Campaign Act Amendments of 1974, and the Federal Election Campaign Act Amendments of 1976.[2] The provisions directly at issue are 2 U.S.C. §§ 431(e)(5)(F), 431(f)(4)(H), 441a(a)(1)(C) and 441(b)(2)(C).[3]

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[2]Subsequent to the commencement of these proceedings, the Act was amended by the Federal Election Campaign Act Amendments of 1979, Public Law No. 96-187, 96 Stat. 187. These amendments became effective on January 8, 1980. Certain provisions pertinent to this appeal have been renumbered as a result of the 1979 Amendments.

[3]Section 431(e)(5)(F) and § 431(f)(4)(H) were amended and renumbered by the 1979 Amendments as § 431(8)(B)(vi) and § 431 (9)(B)(v), respectively. The changes are nonsubstantive. Both versions appear in Appendix C.

The first amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

The fifth amendment to the United States Constitution provides, in part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2 U.S.C. § 441a(a)(1) provides, in part:

> "No person shall make contributions—
>
> * * *
>
> (C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000."

2 U.S.C. § 441b(b)(2) provides, in part:

> "For purposes of this section . . . the term 'contribution or expenditure' . . . shall not include—
>
> * * *
>
> (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

2 U.S.C. § 431(e) provides, in part, that the term contribution:

> (5) "does not include—
>
> * * *
>
> (F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;"

2 U.S.C. § 431(f) provides, in part, that the term expenditure:

> (4) "does not include—
>
> * * *
>
> (H) any payment made or obligation incurred by a corporation or labor organization which, under the provisions of section 441b, would not constitute an expenditure by such corporation or labor organization;"

QUESTIONS PRESENTED

In general terms the issue presented by this appeal is whether the court of appeals was correct in answering the questions certified by the district court in the negative. The certified questions are set forth verbatim in Appendix C, and in Appendix A, at 2-3, n.1. Inherent in this appeal are the questions:

1. Does 2 U.S.C. § 437h(a) limit certification to questions of the "factual constitutionality" of the Act?

2. Did the court of appeals correctly interpret 2 U.S.C. § 441b(b)(2)(C) to exclude unincorporated membership organizations from the exception provided in that section for certain contributions by corporations, labor organizations, membership organizations, cooperatives or corporations without capital stock?

3. Does 2 U.S.C. § 441a(a)(1)(C) violate the first amendment on its face?

4. Does 2 U.S.C. § 441a(a)(1)(C) violate the first amendment when applied to limit contributions by CMA, an unincorporated association, to CALPAC, a political committee sponsored by CMA, made solely for the purpose

of establishing, administering, or soliciting contributions to CALPAC?

5. Does 2 U.S.C. § 441b(b)(2)(C) when read with 2 U.S.C. § 431(e)(5)(F) and § 431(f)(4)(H), violate the fifth amendment on its face?

6. Does 2 U.S.C. § 441b(b)(2)(C), when read with 2 U.S.C. § 431(e)(5)(F) and § 431(f)(4)(H), violate the fifth amendment when these provisions limit to $5,000 per year what CMA may contribute to CALPAC, and what CALPAC may receive from CMA, for the purpose of establishing, administering, and soliciting contributions to CALPAC, while corporations and labor organizations are permitted to make unlimited contributions to a separate segregated fund for the purpose of establishing, administering and soliciting contributions to the fund, and such separate segregated funds may receive unlimited contributions from a corporation or labor organization for the purpose of establishing, administering and soliciting contributions to the fund?

STATEMENT OF THE CASE

Proceedings Below

Appellants' complaint was filed on May 7, 1979, in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief with respect to provisions of the Act limiting the amount which CMA may contribute to CALPAC for the purpose of establishing, administering and soliciting contributions to CALPAC to $5,000 per calendar year. Likewise, appellants sought declaratory and injunctive relief with respect to provisions of the Act limiting to $5,000 per cal-

endar year the amount which CALPAC may receive from CMA as "administrative support."[4]

Specifically, appellants sought a judgment declaring 2 U.S.C. § 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H), and § 441a(a)(1)(C) unconstitutional in violation of the first amendment, to the extent these provisions on their face, or as interpreted and applied, placed limits on the amount CMA could contribute to CALPAC, and CALPAC could receive from CMA, for purposes of establishing, administering and soliciting contributions to CALPAC. The same relief was sought on the grounds that these provisions violated appellants' rights under the fifth amendment. Appellants also sought to enjoin enforcement of 2 U.S.C. § 441a(a)(1)(C) against CMA and of 2 U.S.C. § 441a(f) against CALPAC.[5]

On May 17, 1979, appellants filed a motion in the present action to certify constitutional questions to the court of appeals pursuant to 2 U.S.C. § 437h. The motion was supported by affidavits executed by CMA's executive director, CALPAC's executive secretary, appellant Sidney E. Foster,

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[4]The order by the district court and appellants' briefs below have used the term "administrative support" as shorthand for contributions made for ". . . the establishment, administration, or solicitation of contributions to . . ." a political committee. The phrase appears in 2 U.S.C. § 441b(b)(2)(C). It was used in the opinions of the court of appeals, apparently in the same sense.

[5]2 U.S.C. § 441a(f)(1980) provides: *Prohibited contributions and expenditures.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section."

M.D., and appellant E. Kash Rose, M.D. Appellees opposed the motion for certification and also filed a motion to dismiss. The motions were heard on June 29, 1979. On July 9, 1979, the court entered an Order Certifying Constitutional Questions to the United States Court of Appeals for the Ninth Circuit and Denying Motion to Dismiss. (Appendix C.) On July 13, 1979, appellees filed an answer to the complaint.

The case was fully briefed and oral argument was heard before the court of appeals sitting en banc on October 11, 1979. On May 23, 1980, the court of appeals in a divided vote sustained the constitutionality of the provisions in question.[6]

Import of the Statutes Involved

The provisions challenged here involve the statutory scheme of limitations on contributions and expenditures enacted by the 1974 Amendments, as refined and supplemented by the 1976 Amendments. With the enactment of 2 U.S.C. § 441a(a)(1)(C) in 1976, a limit of $5,000 per calendar year was placed on the amount a "person"[7] could

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[6]On May 22, 1979, the Federal Election Commission filed an action in the United States District Court for the Northern District of California, *Federal Election Commission v. California Medical Association and California Medical Political Action Committee*, C-79-1197-WHO. In pertinent part, this enforcement action alleged that CMA had violated 2 U.S.C. § 441a(a)(1)(C) and CALPAC had violated § 441a(f) because of CMA's support of CALPAC. Civil penalties were sought pursuant to 2 U.S.C. §§ 437g(a)(5)(B) and (C)(1976). The case was tried before Judge William H. Orrick on May 17-18, 1980. The parties are awaiting a decision.

[7]2 U.S.C. § 431(11) (1980) states: "The term 'person' includes an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons,

contribute to a political committee.[8] These provisions limit all contributions that CMA can make to CALPAC, and which CALPAC can receive from CMA, to $5,000 per calendar year.

Under 2 U.S.C. § 441b(b)(2)(C), when read with 2 U.S.C. § 431(e)(5)(F) and § 431(f)(4)(H), corporations and labor organizations are permitted to contribute unlimited amounts for the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by the corporation or labor organization. These provisions specifically exempt from the definition of "contribution" and "expenditure" anything of value provided by a corporation or labor organization for the establishment, administration, and solicitation of contributions to a separate segregated fund.[9]

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but such term does not include the Federal Government or any authority of the Federal Government."

[8]Contributions by "persons" to a candidate or his authorized political committee are limited to $1,000 per election, 2 U.S.C. § 441a(a)(1)(A). Contributions by "persons" to political committees established by a national political party are limited to $20,000 per calendar year, § 441a(a)(1)(B). Separate limitations apply to contributions by multicandidate political committees. Under § 441a(a)(2)(A) a multicandidate political committee may contribute up to $5,000 per candidate in an election. CALPAC is a multicandidate political committee, as defined by § 441a(a)(4). The term political committee is defined in § 431(4)(1980).

[9]11 C.F.R. 114.1(b) states: "Establishment, administration, and solicitation costs" means the cost of office space, phone, salaries, utilities, supplies, legal and accounting fees, fundraising and other expenses incurred in setting up and running a separate segregated fund established by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." A separate segregated fund is one type of political committee, § 431(4)(B)(1980).

Because of the limit set by 2 U.S.C. § 441a(a)(1)(C) and the absence of a similar exemption for unincorporated associations, CMA's administrative support of CALPAC is limited to $5,000 per calendar year.[10]

Decision of the Court of Appeals

Application of 2 U.S.C. § 437h: Seven of the nine members of the court of appeals participating in the decision joined in that part of the majority opinion dealing with the application of 2 U.S.C. § 437h. The majority noted jurisdiction under section 437h(a), but heard the appeal en banc pursuant to Federal Rule of Appellate Procedure 35, stating the importance of the case warranted that determination. The majority rejected the need to distinguish "facial" constitutionality from "as applied" validity in exercising jurisdiction under section 437h. (Appendix A, at 24-27.)

In a concurring and dissenting opinion, Judge Wallace, joined by Judge Anderson, concluded that this case was not of such exceptional importance as to justify a hearing en banc pursuant to Rule 35. However, Judge Wallace con-

[10]The Act provides for enforcement by the FEC and the Attorney General. Injunctive relief is available, and civil penalties may be assessed for violations of the Act. Under 2 U.S.C. § 437g(a)(6)(B) (1980), a civil penalty of the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation may be assessed. Pursuant to 2 U.S.C. § 437g(a)(6)(C) (1980), knowing and willful violations are subject to a civil penalty of the greater of $10,000 or an amount equal to 200% of any contribution or expenditure involved in the violation. Certain violations of the Act are criminal offenses. Under section 437g(d)(1)(A) any person who knowingly and willfully violates provisions of the Act which involve the making, receiving or reporting of contributions or expenditures aggregating $2,000 or more in a calendar year are subject to a fine not to exceed the greater of $25,000 or 300% of such contribution or expenditure, or imprisonment for not more than one year, or both.

cluded the court did have jurisdiction to hear the appeal en banc pursuant to 2 U.S.C. 437h, but the court was limited to challenges to the "facial constitutionality" of the Act. (Appendix A, at 33-43.)

The majority cited 2 U.S.C. § 437h(a) and *Buckley v. Valeo,* 424 U.S. 1, 8-12 (1976) (*per curiam*) to conclude appellants had standing to bring this action. (Appendix A, at 3.) In his concurring and dissenting opinion, Judge Wallace noted the statutory right to sue pursuant to 2 U.S.C. § 437h(a), and concluded that Dr. Foster and Dr. Rose each had a sufficient personal stake in the proceeding because the restrictions imposed by the Act on CMA and CALPAC, if unconstitutional, interfered directly with their first amendment rights as members of CMA and CALPAC, thus satisfying the requirements of article III. (Appendix A, at 44-46.)

Statutory Interpretation: The entire court concluded that section 441b(b)(2)(C) could not be interpreted to allow an unincorporated association to provide unlimited "administrative support" to its political committee, because unincorporated associations were not covered by the general prohibition contained in section 441b(a) to which the exception in section 441b(b)(2)(C) applies. (Appendix A, at 18-21; 47-51.)

Constitutional Issues—Majority Opinion: Five members of the court joined in that portion of the majority opinion which rejected appellants' contentions and answered the certified questions in the negative. The majority found the provisions in question were designed to protect the integrity of the political process and to vindicate first

amendment interests. (Appendix A, at 6.) The majority equated contributions to political committees with contributions made directly to a candidate or a candidate's authorized committee and found the $5,000 limit was needed to prevent the aggregation of funds for use as contributions. The limitation on contributions to political committees was found necessary for limits on contributions to candidates to remain effective. The majority rejected the contention the limits are redundant, finding them necessary to prevent evasion of other limits established by the Act. (Appendix A, at 6-10.)

The majority also held that the $5,000 limit did not intrude except in a most minimal way on the right of associations, stating that associations could engage in unlimited independent advocacy and solicitation of members. (Appendix A, at 12.)

The majority rejected the contention that contributions to a multicandidate political committee were other than symbolic acts. Citing *Buckley v. Valeo,* 424 U.S. at 20-21, the majority found the limits entail only a marginal restriction on the ability to engage in free speech. The majority specifically rejected the application of the "close scrutiny" applied in *Buckley v. Valeo* to the expenditure limitations declared unconstitutional there. The majority found the limits to be as closely drawn as the limits on contributions in *Buckley v. Valeo.* (Appendix A, at 14-18.)

With respect to appellants' equal protection arguments, the majority rejected the contention that an unincorporated association is unconstitutionally disadvantaged because the administrative support it may provide to a political com-

mittee is subject to the $5,000 calendar year limit. Because unincorporated associations are subject to different regulations than corporations or labor organizations, the majority found an attempt to compare the regulation of these entities solely with respect to the $5,000 limit on administrative support which could be furnished to political committees to be a false comparison. The majority relied on provisions of the Act precluding corporations and labor organizations from making direct contributions and expenditures, and limiting solicitation activities of corporations and labor organizations. (Appendix A, at 18, 21-24.)

The majority also found that limitations on administrative support by an unincorporated association for its political committee served a legitimate purpose. Without further analysis the majority relied on the rationale justifying the $5,000 limit on all contributions to a political committee. Limits on administrative support were found a necessary part of the statutory scheme, and a "proper concomitant regulation." (Appendix A, at 24.)

Constitutional Issues—Dissent: In that portion of the dissenting and concurring opinion dealing with the merits ("the dissent"), Judge Wallace, joined by two other members of the court, concluded that the $5,000 limitation on contributions to a political committee contained in 2 U.S.C. § 441a(a)(1)(C), when considered in light of the administrative support exemption for corporations and labor organizations, was unconstitutional on its face. In reaching this conclusion, the dissent analyzed the different treatment of unincorporated associations as compared to corpo-

rations and labor organizations in first amendment terms. The dissent concluded that "careful scrutiny dictated by the first amendment" was appropriate to review these provisions. (Appendix A, at 53.)

The dissent reviewed in detail the analysis of limits on expenditures and contributions in *Buckley v. Valeo*. The dissent concluded that a single standard of review was applied in *Buckley v. Valeo* to both expenditure and contribution limitations, that this standard of review compels "careful analysis" of the governmental interests underlying the $5,000 limit, and that in *Buckley* the Court applied a balancing test and asked whether the challenged regulations were "closely tailored" to achieving the asserted objectives. (Appendix A, at 53-62.)

Judge Wallace stated close tailoring is necessary because (1) of the interest in unfettered speech and association and (2) when regulations are not closely fitted to the asserted legitimate objective, questions can be raised whether the articulated objective is the actual reason for the restriction. Judge Wallace found the asserted objectives which purportedly justified a $5,000 limit on contributions to a political committee could not withstand first amendment scrutiny. In addition the government's interests did not outweigh the impact on the freedom of speech and association, and the regulatory means were not closely tailored to achieve the asserted governmental interests. (Appendix A, at 62-72.)

The dissent states that the speech and associational interests abridged by the $5,000 limit are more substantial than the interests affected by limits on contributions to a

candidate sustained in *Buckley v. Valeo.* Support for a political committee does more than merely indicate "support" for the committee's views, but also use of the political committee to voice the sponsor's own views, such as by making funds available for independent expenditures by the committee. The $5,000 limitation therefore imposes direct and substantial restraints on political speech by the association and its members. (Appendix A, at 62-64.)

The dissent also states there is substantial impact upon associational freedoms as a result of the $5,000 limitation. Citing the "amplifying" ability of organizations, the dissent holds that the associational interests infringed by the $5,000 limit were equivalent to the associational interests unconstitutionally infringed by expenditure limitations. (Appendix A, at 64-65.)

The governmental interests served by a limit on contributions to political committees were found to be weak in comparison to the strong individual speech and associational interests involved. The dissent notes that valid regulatory purposes enunciated in the legislative history are accomplished by other provisions of the Act. The *quid pro quo* concerns justifying a limit on contributions to candidates were distinguished. The dissent did not find significant government "anti-corruption objectives" to support substantial infringements on speech and association rights inherent in the $5,000 limit. (Appendix A, at 65-70.)

Judge Wallace's opinion also relies on language in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 784-786 (1978) and *Buckley v. Valeo,* 424 U.S. at 48-49, which pro-

hibits the government for limiting differentially the speech of a particular person in an effort to achieve a harmonious regulatory balance. (Appendix A, at 71-72.)

In a separate concurring and dissenting opinion, Judge Choy concurred in the analysis made in Judge Wallace's dissent on the merits and concluded that § 441a(a)(1)(C) should be held unconstitutional, but only insofar as it applies to unincorporated associations. Judge Choy reached this result by analyzing § 441a(a)(1)(C), which limits contributions made by a "person" and the definition of that term in § 431(h). (Appendix A, at 28-30.)

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises a constitutional challenge to limits on contributions to political committees enacted following the decision in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*). The issues concern whether the limits infringe upon the exercise of free speech and association by persons who choose to make contributions to a political committee. The issues are fundamental and have far-reaching implications for the exercise of first amendment rights by any person contributing to a political committee. The issues are particularly significant for unincorporated associations, and their members, if they choose to sponsor a political committee.

The first amendment protects interests beyond those of the parties and serves a significant societal interest. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978). To the extent the limits imposed by section 441a (a)(1)(C) inhibit the exercise of speech and association, they diminish legitimate political activity. The correlative

rights of persons who would benefit from increased political activity from the speech and associational activities that would occur, but for the limits challenged here, must be considered. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

This action was originally brought for the narrow purpose of relieving CMA and CALPAC from the $5,000 limit on administrative support. Appellants sought relief so that CMA could furnish goods and services in support of CALPAC without reference to an annual $5,000 limit. All of the questions certified by the district court are framed in terms of "administrative support." See Appendix C. The majority's discussion of the impact that total invalidation of 2 U.S.C. § 441a(a)(1)(C) might have obscures the narrower issues originally presented. Because of a preoccupation with all limits on contributions to political committees, the majority gave relatively little attention to the narrow question of whether administrative support could be limited. The majority's conclusion that a limitation on administrative support is a "proper concomitant regulation" (Appendix A, at 24) was reached without a complete examination or understanding of the relationship of legislative purposes underlying the Act and the limit on administrative support.

A more refined analysis is necessary to properly evaluate whether or not the $5,000 limit on contributions to political committees can be applied to limit administrative support by an unincorporated association for its political committee,

while corporations and labor organizations are permitted to provide unlimited support to their separate segregated funds. Even considering only the narrow question of administrative support by an unincorporated association, the issues presented here have special significance for all entities other than corporations and labor organizations, and their members, that choose to support a political committee. Indeed, any person who chooses to support a political committee has an interest in these issues.

The need for a full hearing on this appeal is emphasized by the divergent conclusions reached by the majority, as compared with the dissent, which would invalidate section 441a(a)(1)(C) as unconstitutional on its face.

Scope of 2 U.S.C. § 437h

This appeal raises significant issues regarding the proper scope of 2 U.S.C. § 437h. The majority rejected the notion that section 437h(a) limited the court to questions of "facial constitutionality," citing the difficulties inherent in distinguishing "facial" validity from "as applied" validity. (Appendix A, at 24.) The dissent would limit section 437h(a) to consideration of facial constitutionality. (Appendix A, at 34, 38-40.) The question of standing was only addressed by the dissent. (Appendix A, at 44-46.) Both issues continue to be significant. *See, Bread Political Action Committee v. Federal Election Commission,* 591 F.2d 29 (7th Cir. 1979); *Martin Tractor Co. v. Federal Election Commission,* 460 F.Supp. 1017 (D.C.D.C. 1978), *aff'd,* D.C. Cir. No. 79-1027 (May 8, 1980).

Infringement of First Amendment Rights

The analysis in *Buckley v. Valeo* of the limits on contributions and expenditures begins with the acknowledgement that these limits operate in ". . . an area of the most fundamental First Amendment activities." 424 U.S. at 14. The protection afforded by the first amendment extends to political association as well as political expression. 424 U.S. at 15, citing *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). In addressing the limits on independent expenditures, the Court in *Buckley* found that these limits would preclude most associations from effectively amplifying the voice of their adherents, and it was therefore an interference with the exercise of first amendment rights by their adherents. 424 U.S. at 22, citing *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957).

Association enhances effective advocacy of both public and private points of view, particularly controversial ones. *NAACP v. Alabama,* 357 U.S. at 460. A political committee, such as CALPAC, presents a medium for the intelligent exercise of first amendment rights. The right of free speech includes the right of individuals to pool their activities under a name and form which will identify their collective interests. The expression of group sentiment is, of course, an integral part of the electoral process. *U.S. v. C.I.O.,* 335 U.S. 106, 143-144 (1948) (concurring opinion). For a variety of reasons, collective political action is a more feasible and influential course than individual or autonomous activity. *NAACP v. Alabama,* 357 U.S. at 460; *Pollard v. Roberts,* 283 F.Supp. 248 (E.D. Ark. 1968), *aff'd per curiam,* 393 U.S. 14 (affiliation with and contributions to a political party). Limitations on CMA's spon-

sorship of CALPAC inevitably will infringe on CALPAC's ability to engage in effective political activity.

On question presented concerns the extent to which CMA's sponsorship of a political committee encompasses the direct exercise of protected associational rights. For purposes of the first amendment it is irrelevant that CMA is an unincorporated association, since the inherent worth of speech does not depend on the identity of the source, whether corporation, association, union or individual. *First National Bank of Boston v. Bellotti,* 435 U.S. at 777. The same rationale should extend to associational rights.

Limits on CMA's support of CALPAC, particularly in light of the support corporations and labor organizations may provide to their political committees, encompasses more than a "minimal" constraint. The limits on administrative support reduce CALPAC's ability to function effectively in comparison to other political committees.[11]

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[11]According to *FEC Reports on Financial Activity 1977-1978, Interim Report No. 4, Vol. I, Summary Tables,* May 1979, 697 of the 821 corporate political action committees registered with the FEC, 211 of 281 labor political action committees and 339 of 542 "trade association/membership organization/health pacs" made contributions to candidates for federal office during 1977-1978. The report does not indicate if any of the trade associations or membership organizations were unincorporated. Appellants believe that most of these organizations are incorporated.

See Institute of Politics, John F. Kennedy School of Government, Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act, 1972-78,* Prepared for the House Comm. on House Admin., 96th Cong. 1st Sess. 4-5 (Comm. Print 1979), cited by the majority apparently for the proposition that the influence of political committees on the electoral process is increasing.

The majority dwells on the comparison in *Buckley* between symbolic speech and the exercise of "core" first amendment rights. Appellants contend that the majority failed to accord sufficient weight to their associational rights and that further consideration is merited. In analyzing the $5,000 limit on contributions to a political committee, the majority erroneously rejected the "close scrutiny" used in *Buckley v. Valeo.* (Appendix A, at 7, fn.4, and at 15.) In sharp contrast, the dissent found that the limits on contributions must be analyzed in light of the "vigorous scrutiny" appropriate when first amendment rights are involved. (Appendix A, at 53.) The dissent distinguished *Buckley v. Valeo,* finding the speech and associational interests abridged by the limits to be more substantial than the interests affected by the limits on contributions sustained in *Buckley.* (Appendix A, at 62.) The dissent states that limits on contributions from an unincorporated association to its political committee entail more than an infringement on symbolic speech but instead imposes "direct and substantial restraints on the quantity" of political speech by an incorporated association and its members. (Appendix A, at 63-64, citing *Buckley v. Valeo,* 424 U.S. at 39.) The dissent goes on to find that there are even more substantial restraints on associational freedoms, on par with the associational interests unconstitutionally infringed by the expenditure limitations invalidated in *Buckley,* stating:

> ". . . the majority erroneously likens the section 441a(a)(1)(C) donation restriction to the contribution limitations upheld in *Buckley.* Section 441a(a)(1)(C) imposes 'direct and substantial restraints on the quantity' of an unincorporated association's, and

its members', 'political speech."[24] *Id.* at 39. The individual speech interests are therefore comparable to those affected by the expenditure limitations invalidated in *Buckley.*" (Appendix A, at 63-64.)

Significantly, the dissent analyzed *Buckley* as applying a single standard of review to both the expenditure and contribution limitations, concluding that "careful analysis" of asserted governmental interests was required. (Appendix A, at 60.)

In comparing the opinions below, it is apparent that the majority gave much less deference to the first amendment rights of an unincorporated association and its adherents than the dissent. Appellants contend that the analysis in Judge Wallace's opinion is correct, and that this result is compelled by *Buckley v. Valeo* and the cases cited therein. The majority's approach understates the first amendment issues inherent in limits on contributions to a political committee, and therefore applies an inappropriate standard to review the limits.

Rationale Justifying The $5,000 Limitation

In justifying the $5,000 limitation, the majority concludes that two valid legislative purposes are served: the prevention of the aggregation of funds for contribution purposes and the prevention of evasion of the limits on contributions. (Appendix A, at 9-12.)

With respect to the prevention of the aggregation of funds, the majority concludes that section 441a(a)(1)(C) was enacted to limit the collection of money by political committees, otherwise there would be "potentially enormous opportunities for corruption." (Appendix A, at 8.)

As the dissent points out, this ignores other provisions of the Act, and no legislative history is cited to justify a finding that collection of funds rather than the subsequent disbursement of funds should be regulated. *Buckley v. Valeo* held the Act was designed to prevent corruption or the appearance of corruption. 424 U.S. at 26, 47-48, 53. The Court then found that limits on expenditures could not be sustained because of the absence of a potential *quid pro quo* arrangement between contributor and candidate. 424 U.S. at 46. The dissent here correctly identified the absence of a *quid pro quo* relationship with respect to contributions to political committees. The dissent notes a lack of valid, articulated purposes regarding the 1976 Amendments sufficient to justify a limit on support for political committees, and states the court of appeals cannot hypothesize regarding conceivable purposes in this context, citing, *e.g., Johnson v. Robison,* 415 U.S. 361, 376-377 (1975). (Appendix A, at 68-69.)

The majority quotes and then disregards existing limitations on contributions *by* a political committee to candidates or other political committees. Assuming the political committee in question qualifies as a multicandidate committee, it is subject to a limitation of $5,000 per contribution, section 441a(a)(2)(A) and (C). If the committee does not qualify as a multicandidate committee, it is subject to a $1,000 limit on contributions to candidates, section 441(a)(1)(A), or a $5,000 limit on contributions to other political committees, section 441a(a)(1)(C). The majority concludes, without really explaining, why the collection of funds is inherently corruptive when limits already exist on the use of funds by the committee.

The second stated purpose justifying the limits, prevention of evasion of other contribution limitations, ignores the comprehensive nature of the remaining provisions of section 441a(a). Attempts to evade the $1,000 limit on contributions to a candidate, or the $5,000 limit on contributions to a multicandidate political committee, are addressed by 2 U.S.C. §§ 441a(a)(7) and (8)(1980). Thus, contributions to a named candidate which are made to a political committee authorized by the candidate to accept contributions are considered contributions to the candidate under section 441a(a)(7)(A). Any expenditures made in cooperation with a candidate, or at his request or suggestion, is considered a contribution to the candidate, section 441a(a)(7)(B)(i). Financing of the dissemination or re-publication of any campaign materials prepared by a candidate is considered an expenditure for purpose of this limitation, section 441a(a)(7)(B)(ii). Furthermore, contributions made "directly or indirectly" on behalf of a candidate, including contributions which are "earmarked or otherwise directed through an intermediary or conduit to such candidate" are treated as contributions to the candidate, section 441a(a)(8). These provisions, when read in conjunction with the existing limits set forth in section 441a(a)(1)-(3) present a comprehensive scheme of regulation of activities involving contributions disguised as independent advocacy.

The basic purpose of the Act as enunciated by *Buckley v. Valeo*, the prevention of corruption or the appearance of corruption, is not furthered by the addition of a limitation on contributions to political committees. This is particularly so when the contribution involved is administrative support in the form of goods and services by an unicorpo-

rated association for its own political committee. The majority simply fails to accord proper weight to other provisions of the Act which adequately deal with attempts to circumvent the valid limits applied on contributions to candidates in considering CMA's support of CALPAC.

The dissent also analyzed the governmental interests purportedly served by the $5,000 limit. (Appendix A, at 65-71.) In rejecting the majority's reliance on a committee report, H.R. Rep. No. 1057, 94th Cong. 2nd Sess. 56-57 (1976), the dissent found that the need to restrict the opportunity to circumvent valid limits on contributions or to insure accurate reporting were insufficient to sustain section 441a(a)(1)(C). The dissent noted that ". . . such misuse is reached elsewhere in FECA's statutory scheme", and discussed sections 441a(a)(7) and (8) (1980). (Appendix A, at 66-67.) In effect, the dissent rejected the notion that section 441a(a)(1)(C) was a valid "loophole" closing provision. *See, Buckley v. Valeo*, 424 U.S. at 44.

In further analyzing the basis for the limit on contributions to a political committee, the dissent distinguished the contribution limitations approved in *Buckley*, noting the absence of a *quid pro quo* relationship with candidates and the existing limits on contributions to candidates. The dissent states:

> "Section 441a(a)(1)(C), in contrast, regulates an entirely different relationship: that of donor ('person') to committee. The purposes behind the contribution limits approved in *Buckley* and the donation restriction in section 441a(a)(1)(C) are necessarily distinguishable because a different relationship is being regulated. The majority simply ignores these differences which distinguish our case from *Buckley*." (Appendix A, at 69.)

The dissent concluded by finding an absence of any significant anti-corruptive objective to be achieved by the limit on contributions to a political committee. Applying the balancing approach used in *Buckley,* the dissent found that no governmental interest outweighed the impact the $5,000 limit on contributions to political committees has on speech and associational freedoms. Since less drastic means had been applied to serve a valid governmental purpose, the $5,000 limit was therefore unconstitutional (Appendix A, at 70.)

The questions presented here concern whether any valid governmental purposes are served by the limits, and the extent to which these purposes are served by other, less drastic means. Appellants believe the result reached by the majority is incorrect for the reasons set forth in the dissent.

Lack of Statutory Precision

Statutes regulating in the area of first amendment rights must be drawn narrowly and with precision. *E.g., Dombrowski v. Pfister,* 380 U.S. 479, 487 (1965); *NAACP v. Button,* 371 U.S. 415, 433 (1963). The dissent concluded that even if sufficient justification existed for section 441a(a)(1)(C), the application of the limits to unincorporated associations while corporations and labor organizations could provide unlimited amounts of "administrative support" presented a regulation not sufficiently tailored to achieve valid governmental purposes. (Appendix A, at 70-71). The dissent found the limits underinclusive because corporations and labor organizations could use the admin-

istrative support provisions to circumvent other limitations applied to them, so that the "corruptive potential of administrative support" was the same for unincorporated associations, corporations and labor organizations. (Appendix A, at 71.) The dissent explicitly rejected the notion the Act provides a balanced regulatory framework permitting varying treatment of labor organizations and corporations insofar as administration support for a political committee is concerned, citing, *Buckley v. Valeo,* 424 U.S. at 48-49 and *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 784-786 (1978). The only valid purpose of the Act, the reduction of corruption or the appearance of corruption, is not served by this unequal treatment of unincorporated associations. (Appendix A, at 71.) In essence, the dissent also found that the limits involved sweep too broadly, where a more narrow regulation would be sufficient.

The majority did not analyze the overbreath of the statute except to conclude the limitation on contributions to multicandidate political committees is necessary to prevent the aggregation of funds and is as closely tailored to fit this purpose as the closely drawn limits in *Buckley.* (Appendix A, at 9, 15.) The majority reached this result by overlooking other provisions of section 441(a) addressing contributory activity and by failing to acknowledge the relationship of those who contribute to political committees, the committees, and candidates.

The questions presented involve the extent to which limits on contributions to political committees also infringe unnecessarily on first amendment rights. Appel-

lants believe that the majority failed to appreciate the full scope of section 441a(a) and the corresponding lack of precision in section 441a(a)(1)(C).

Equal Protection

The dissent analyzed the limits on contributions to political committees as applied to corporations and labor organizations, and as compared with associations in terms of the first amendment. It did not directly address the application of equal protection criteria. (Apendix A, at 53.) However, the dissent's citation of the prohibition on "differential muffling" is significant. (Appendix A, at 71.)

The majority denied the Act discriminates against unincorporated associations because corporations and labor organizations are subject to different regulations. The majority concluded that comparisons are therefore inappropriate because of the difference in the applicable statutes. The majority assumed that the prohibition on direct contributions and expenditures disadvantages corporations and labor organizations, without explaining why the limit on administrative support for a political committee does not disadvantage unincorporated associations. The majority then, without citing any facts, states it doubts that it could be shown corporations or labor organizations can match the power of associations to influence federal elections. This conclusion is contrary to available data[12] and the fact that

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[12]*See, FEC Reports, supra,* n.11, *Vol. III (Corporate and Labor)* reporting that political committees sponsored by corporations disbursed $15.3 million out of $17.7 million collected in 1977-1978 while committees sponsored by labor organizations disbursed $18.9 million out of $19.8 million collected during the same period. The report does not show separate figures for committees sponsored by unincorporated associations.

most large associations are incorporated, and therefore treated for purposes of the Act as corporations. The analysis also fails to acknowledge that corporations and labor organizations may solicit their own shareholders or members, the persons most likely to respond, without limitation.[13] The conclusion reached is unwarranted, particularly in light of the language in *Buckley v. Valeo* that prevents differential regulation of first amendment activities. 424 U.S. at 48-49; *First National Bank of Boston v. Bellotti*, 435 U.S. at 784-786. At the very least, a more complete factual record is required before a conclusion can be reached that the difference in regulations is disadvantageous to corporations and labor organizations.

The issues presented here concern whether or not the majority's analysis of the statutory framework is justified for a conclusion, without reference to any facts, that unincorporated associations are not discriminated against by the limits on administrative support for a political committee.

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[13]2 U.S.C. § 441b(2)(A) permits unlimited communications by corporations to their shareholders and executive or administrative personnel or their families, and by labor organizations to their members and families. Under § 441b(b)(2)(B) corporations and labor organizations may engage in nonpartisan registration and get out the vote campaigns aimed at these same persons. Unlimited solicitations of the same persons are permitted under § 441b(b)(5)(A)(i) and (ii). Twice each year corporations may solicit their employees or families and labor organizations may solicit shareholders, and executive or administrative personnel, and their families pursuant to § 441b(b)(4)(B). Thus, corporations and labor organizations have great latitude to engage in political action.

CONCLUSION

Probable jurisdiction should be noted. In the alternative, this appeal should be set for argument with the question of jurisdiction postponed until the merits are considered.

Respectfully submitted,
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(Appendices Follow)

Appendices

Appendix A

Opinion, filed in the United States Court of Appeals for the Ninth Circuit on May 23, 1980, including concurring and dissenting opinions by Judge Choy and Judge Wallace.

United States Court of Appeals
For the Ninth Circuit

No. 79-4426

California Medical Association, a not-for-profit unincorporated association, California Medical Political Action Committee, a political committee, Sidney E. Foster, M.D., and E. Kash Rose, M.D.,

Plaintiffs-Appellants,

vs.

Federal Election Commission, Honorable Joan D. Aikens, Chairman, Honorable Robert O. Tiernan, Vice-Chairman, Honorable Thomas E. Harris, Commissioner, Honorable John McGarry, Commissioner, Honorable Vernon E. Thompson, Commissioner, Honorable Max Freidersdorf, Commissioner, Honorable J. Stanley Kimmit, Secretary, United States Senate and Ex-Officio Member of the Federal Election Commission, Honorable Edmund L. Henshaw, Jr., Clerk, House of Representatives and Ex-Officio Member of the Federal Election Commission,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: Wright, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, and Tang, Circuit Judges*

*Chief Judge Browning did not hear the arguments and has not participated in this decision. Subsequent to oral argument, Judges Ely and Trask took senior status and did not participate in this

Kennedy, Circuit Judge:

This is an appeal from an order of the district court certifying four questions concerning the constitutionality of limits on contributions to a political action committee under the Federal Election Campaign Act as amended in 1976.[1] 2 U.S.C. §§ 431-442, 451-456 (1976) (as amended,

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decision. *See United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960). Subsequent to the oral argument, Judge Hufstedler resigned from the court and did not participate in this decision.

[1]The district court certified both the plaintiffs' and the defendants' questions, as follows:

Plaintiffs' questions:

a. Does the $5,000 calendar year limit established by 2 U.S.C. § 441a(a)(1)(C) on contributions to a political committee, when applied to contributions of administrative support as specified in § 441b(b)(2)(C) by CMA, an unincorporated association, to CALPAC, CMA's political action committee, violate the First and Fifth Amendments to the Constitution, when these provisions, and 2 U.S.C. §§ 431(e)(5)(F) and 431(f)(4)(H), on their face and as interpreted by the Federal Election Commission, allow unlimited contributions of such administrative support by corporations and labor organizations to their respective political action committees?

b. Does the $5,000 calendar year limit established by 2 U.S.C. § 441a(a)(1)(C) on contributions to a political committee, when applied to CALPAC's receipt of contributions of administrative support as specified in § 441b(b)(2)(C) from CMA, an unincorporated association and CALPAC's connected organization as defined in 11 C.F.R. § 100.15, violate the First and Fifth Amendments to the Constitution when these provisions, and 2 U.S.C. §§ 431(e)(5)(F) and 431(f)(4)(H), on their face and as interpreted by the Federal Election Commission, allow receipt of unlimited contributions of such administrative support by political action committees sponsored by corporations and labor organizations?

Defendants' questions:

a. Do §§ 441b(b)(2)(C), 431 (e)(5)(F) and 431(f)(4)(H), which on their face exclude expenditures by corporations

1980). We hear the appeal en banc pursuant to Fed. R. App. P. 35. Standing and jurisdiction are conferred by, *inter alia*, 2 U.S.C. § 437h(a) (1976). *See Buckley v. Valeo*, 424 U.S. 1, 8-12 (1976) (per curiam).

The case turns on important statutory provisions pertaining to entities defined by the Act as political committees. CALPAC is a political committee affiliated with the California Medical Association (CMA). CALPAC and CMA were two of the plaintiffs below. The other plaintiffs were individual members of CMA named Foster and Rose, who are eligible voters with standing to bring the action pursuant to 2 U.S.C. § 437h(a) (1976). The plaintiffs below are appellants here.

The appellants make two principal arguments. First, they contend the Act's limit on contributions by CMA to

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and labor organizations for the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes from the definitions of contributions limited by § 441a(a), but do not on their face exclude expenditures for similar purposes by CMA, an unincorporated association, from the same definitions, violate plaintiffs' rights under the First and Fifth Amendments to the United States Constitution?

b. Do §§ 441b(b)(2)(C), 431(e)(5)(F) and 431(f)(4)(H), which on their face exclude the receipt of contributions from corporations and labor organizations by separate segregated funds for the establishment, administration and solicitation of contributions to the separate segregated funds to be utilized for political purposes from the definitions of contributions limited by § 441a(a), but do not on their face exclude the receipt of contributions from CMA, an unincorporated association, by CALPAC from the same definitions, violate plaintiffs' rights under the First and Fifth Amendments to the United States Constitution?

CALPAC is an infringement of their first amendment right of speech and political expression. Second, the appellants challenge the FEC's interpretation of the Act which requires that administrative support given by associations such as CMA to a multicandidate political committee must be counted as part of the dollar limit set on payments to such committees, when, by contrast, a labor union or corporation may give unlimited administrative support to a subspecies of political committee designated under the Act as a "segregated fund." The appellants allege that the FEC's interpretation of the Act is incorrect as a matter of statutory construction, or, that if it is correct, it is unconstitutional. Each of the appellant's principal contentions is erroneous and each is rejected.

I

In 1976 the Supreme Court held it was constitutional to limit contributions to candidates in federal elections to $1,000. *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). Following the *Buckley* decision and as a matter of legislative grace,[2] Congress opened a wider avenue by which individuals could channel funds to candidates: any person, including both natural persons and various kinds of organi-

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[2]We recognize that before the passage of the 1976 amendments there was no limitation on contributions by persons to political action committees. According to our analysis of the Supreme Court's *Buckley* opinion, Congress was empowered to limit contributions from persons to multicandidate political action committees to $1,000, inasmuch as we view the limits on committee contributions to be essentially similar to those on direct candidate contributions. Nevertheless, Congress enacted a more generous, $5,000, limitation on contributions by persons to political action committees.

zations, could contribute up to $5,000 to multicandidate political committees, which in turn could contribute up to $5,000 to each candidate. In this way Congress permitted greater individual contribution possibilities.

Appellants would have us dramatically widen this avenue of indirect contributions to candidates. They use the statutory rule permitting a corporation or union to furnish limited kinds of clerical and similar services to its own segregated fund as a fulcrum in an attempt to dislodge as unconstitutional a critical provision of the Act which limits an association's payments to political committees. The irony of the argument is that corporations and unions are entities generally forbidden to influence federal elections by either expenditures or contributions. To accept appellants' constitutional theory would allow associations to channel to any and all political committees, and thence to candidates, unlimited amounts of cash, services, or other things of value. To drive this wedge through the narrow aperture of section 441a would be to shatter the careful design of the Federal Election Campaign Act. The first amendment does not compel or support that result.

Our colleagues in dissent propose a theory that not only would strike down the provisions before us but also would portend grave consequences for other major features of the Act, not the least of which are the $25,000 annual limit on aggregate individual contributions and the rule that corporations and unions can make no campaign contributions or expenditures at all. Furthermore, an incidental, but nevertheless far-reaching, consequence of the dissent would be to grant associations a special privilege of un-

limited and direct contribution ability, a privilege not extended to individual persons.[3] That distinction appears to us quite unsupportable.

The provisions we examine here were designed to protect the integrity of the political process and to insure that political debate and political speech are effective, and in this regard Congress acted to vindicate first amendment interests, not to derogate them. We find, therefore, that the statutory provisions challenged in this case are constitutional.

II

$5,000 Limit on Payments to Political Committees

As enacted in 1974, the Federal Election Campaign Act imposed dollar limitations both on contributions to candidates and on independent expenditures made by or on behalf of candidates in federal elections. The provisions on candidate contributions were held valid but limits on independent expenditures by or on behalf of candidates were held unconstitutional in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). In response to the decision, Congress amended the Act. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in 2 U.S.C. §§ 431-442, 451-455 (1976) (as amended, 1980)). Consistently with the mandate of the Supreme Court, Congress amended the Act to remove any limitations on independent expenditures. Congress enacted new limitations on permissible payments to political committees,

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[3]The $25,000 annual aggregate ceiling on contributions does not apply to associations, only to individuals. 2 U.S.C. § 441a(a)(3) (1976).

2 U.S.C. § 441a(a)(1)(C) (1976). It is apparent, therefore, that Congress considered payments to a multicandidate political committee to be subject to the same regulatory power, from a constitutional standpoint, as campaign donations made directly to candidates. Upon consideration of the statutory definition of a political committee and by reason of the substantial latitude permitted associations for political expression, including the right to make unlimited expenditures except for direct candidate contributions or payments to multicandidate political committees, we hold that the Congress was correct in its judgment. Appellants make the assertion that Congress had a very limited purpose for enacting the $5,000 limitation,[4] and then proceed to declare that its purpose, as so defined, is just as readily accomplished by other provisions of the Act. They state that the $5,000 limit is only to prevent funneling contributions to a particular candidate and cite section 441a(a)(7)(B)(i) to show that indirect funneling to specific candidates is separately forbidden. This is a crabbed view of the Act and an unrealistic appraisal of the definition and role of a multicandidate political committee.

At the outset it should be noted that a person or an organization, such as CMA, can contribute each year no more than $1,000 to any candidate. 2 U.S.C. § 441a(a)(1)(A). This provision, as we have said, was expressly validated in *Buckley*. A political committee qualified as a multi-

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[4]Because we do not accept the argument that the strictest possible scrutiny is the appropriate standard by which to review the contribution limitation at issue here, we consider a broader range of justifying purposes for the statutory limitation than would otherwise be appropriate. *See, e.g.*, page 6, *infra*.

candidate committee, as CALPAC is, may give a maximum of $5,000 per year to any one candidate. 2 U.S.C. § 441a (a)(2)(A). If the limits on payments to a political committee were to be erased, any association could give unlimited funds to a political committee. Donors could in effect use the multicandidate committee as a vehicle for making $5,000 contributions to an unlimited number of candidates and thereby influence, in fact as well as appearance, the use of vast and substantial sums for direct candidate contributions. That would be an egregious distortion of the existing contribution limits of the Act, provisions specifically sustained by the Court in *Buckley*.

The 1976 amendments gave political action committees great and unsual powers in comparison to either candidates or individuals: Political action committees are unlimited in the total amounts of money they receive, expend, and contribute to candidates. To vest such extraordinary power in political action committees, without some reasonable limits such as section 441a(a)(1)(C) on how they can collect money, would be to create novel and potentially enormous opportunities for corruption. As one study has concluded, even as limited by section 441a(a)(1)(C), political action committees have become vast, unaccountable, and low visibility centers of electoral influence that effectively detach candidates from their nominal geographic constituencies. *See* Institute of Politics, John F. Kennedy School of Government, Harvard University, An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Prepared for the House Comm. on House Admin., 96th Cong., 1st Sess. 4-5 (Comm. Print 1979) [hereinafter cited as FECA Impact Analysis].

The purpose of the $5,000 limitation, therefore, is to prevent the aggregation of funds for contribution purposes so that candidates as a class—identified or not—are not beholden to or influenced by a multicandidate political committee or its principal supporter, and so that the multicandidate political committee cannot become the vehicle for an association to increase its permitted contributions on a wide scale. The limitation on contributions to multicandidate political committees is necessary for this purpose and it is closely tailored to fit it.

There is a necessity for a limitation on payments to multicandidate political committees if the candidate contribution limits are to remain workable. The discussion above also points out the essential fact that a political committee is, by design as well as definition, a natural conduit for candidate contributions and that the essential purpose of the provision here in question is to limit those contributions, not to limit expenditures for any other type of political advocacy. It is an inevitable fact of politics that there will be strong gravitational attraction between political committees and candidates. Multicandidate political committees are natural targets for candidate influence, and from this it follows that there will be temptations to characterize what in fact are contributions as expenditures, contrary to the strictures of the Act. This description of the purpose and effect of the Act fits with the findings of Congress:

> The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candi-

> date's committees, and to impose new limits on the amount a person or a multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Rep. No. 1057, 94th Cong., 2d Sess. 31, 57-58 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 946, 972-73. The accuracy of this judgment has since been confirmed by a study commissioned by the House of Representatives. *See* FECA Impact Analysis, *supra.*

Even if the purpose of the limit were narrowly confined, as the appellants view it, to the first two of the goals listed above, it would not be redundant. It is quite plausible that the difficulty of tracing funneling to candidates, especially by tacit arrangements falling short of coordination, is sufficiently great that a preventive limitation is required in the form of an absolute dollar ceiling on the ability of "persons" (including associations) to contribute to political action committees (which might then "funnel" excessively to candidates). A similar preventive measure based on this kind of enforcement difficulty was specifically approved by *Buckley, see* 424 U.S. at 27-30. But, even more important,

the $5,000 limit serves the additional goals described earlier. *See* pp. 5-7, *supra.*

A multicandidate political committee, such as CALPAC, is, by statutory definition and as a practical matter, an entity with a dominant function of making direct political contributions to candidates. The statute defines such a committee as an entity which has been in existence for six months, has received contributions from fifty or more persons, and has made contributions to five or more candidates. 441a(a)(4). We conclude, therefore, that a multicandidate political committee is sufficiently related to the mechanisms of the Act regulating candidate contributions that the validity of the limits here in question must be sustained upon the authority of *Buckley.*[5]

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[5]A superficially plausible argument might be made that the effect of the limitation in restricting money spent by committees for independent expenditures, rather than for candidate contributions, should be given serious consideration in evaluating the constitutionality of the limitation. Consideration of the possible types of relations between persons and their political action committees vitiates this argument, however. If one were to assume a political action committee with a broad and diverse constituency of supporters, holding, in the aggregate, widely disparate views on the subjects of their committee's electioneering, then the symbolic, proxy-like character of their contributions to the committee, as opposed to true individual expenditures, becomes apparent. In the case of such a committee, the possible transformation and distortion of the contributing persons' views is most conspicuous, and therefore their act of contribution is that much removed from "core political expression." If we are to assume the opposite hypothesis, one in which a political committee precisely mirrors the views of a narrowly defined constituency of committee supporters, the similarity of the limitation to one on core political expression becomes closer, but the severity of the restriction's impact becomes that

It appears also from an examination of the statutory history quoted above that Congress also was concerned about preventing any one person or association from dominating a multicandidate political committee, thereby gaining control over the contributions made by others. It works at cross purposes, therefore, for the appellants to insist that CALPAC is simply the mouthpiece of CMA. As noted, a multicandidate political committee by definition must receive funds from more than fifty persons. Indeed, one of appellants' major objections is that the Act impairs CMA's ability to use a political committee as a vehicle for transmitting as much of its revenue as possible directly to candidates. Therefore, appellants do not, and cannot, equate the limit on payments to the committee with a restriction that is unrelated to a regulation of candidate contributions.

The limit on payments to a multicandidate political committee does not intrude upon the right of associations except in a most minimal way. A critical point in this case is that CMA and any other association may spend as much

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much less significant. This is because the "quantity of political expression" that would be achieved by the political action committee's expenditure of contributed funds for independent expenditures can be precisely equalled, both as to amount and content of the speech, merely by the individual members' independently spending money advocating the same objects that would otherwise be advocated by the political action committee. In any event, this issue is more apparent than real: the appellants focus in this case on the limitation's restriction of their ability to channel funds via multicandidate committees to candidates, and this is only to be expected, inasmuch as the chief, if not the sole, attractive feature of multicandidate political action committees is their enhanced ability to contribute money to candidates, five times an individual's ability.

as it chooses to collect for political speech, including advocacy of a particular candidate's election. The limitation here in question applies only to candidate contributions and payments to multicandidate political committees. And the intrusive potential of the limitation is further diminished when it is noted that, as forcefully and often as it chooses, CMA can solicit its members, and anyone else, to give directly to CALPAC. Thus, if CMA members do equate their own interest with that of CALPAC, they can support CALPAC as individuals.

The first amendment analysis of the Supreme Court in *Buckley* controls this case and supports the conclusion that payments to a political committee may be restricted consistently with the Constitution. *Buckley,* and the more recent decision in *First National Bank v. Bellotti,* 435 U.S. 765 (1978), stand for the central proposition that the ideal of the first amendment, certainly in respect to political expression, is to permit the maximum "quantity of political speech," as determined by the speaker. *See Buckley, supra,* 424 U.S. at 17, 18, 19, 39, 55. The attempted restrictions on campaign expenditures in both cases were held invalid because political speech in its essential aspect was diminished. The Court's decision in *Buckley* stands for the further proposition that spending is entitled to the maximum protection when the speaker and the spender are one and the same. 424 U.S. at 20-21. At that point the individual and idiomatic character of political speech is at its highest, for the articulation of the idea is by the one who originates the speech. By contrast, the donee of a contributor has the power to distort, alter, or transform the contributor's mes-

sage. This was the rationale the Court used to strike down attempted limits on expenditures by political advocates or by candidates on their own behalf, and to sustain limits on campaign contributions. *Id.*

Campaign contributions, by contrast with expenditures, were viewed by the Court primarily as symbolic acts showing support, rather than as expository acts of advocacy. A contribution is potential speech dependent upon the recipient for its ultimate articulation. The articulation of ideas by a speaker is more central to political expression than is the symbolic support embodied in a contribution, which is essentially a proxy.

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate *or a political committee* entails only a marginal restriction upon the contributor's ability to engage in free communication.

424 U.S. at 20-21 (emphasis added). *See also id.* at 23 ("expenditure ceilings impose significantly more severe restrictions" than contribution limits), 21 (contribution is "undifferentiated, symbolic act"), 39; Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 Sup. Ct. Rev. 1, 20-25.

This classification of payments to multicandidate political committees as sharing the essential characteristics of candidate contributions follows from *Buckley* for two reasons. First, this classification is instrumental to the efficacy of a regulatory goal which the Court found constitutional, *i.e.*, controlling payments to candidates. Second, it is con-

sonant with the Court's analysis of the characteristics of restraints on different kinds of expression and associational rights. The regulation in question does not significantly diminish the effectiveness or the quantity of political speech. The entity wishing to enter the political debate, here an association, retains potent alternative means of expression, including the right of unlimited spending on its own and the right to urge its members, and any other interested citizens, to show support for a political committee by contributing to the committee directly. This restriction does not significantly diminish the quantity of political advocacy or alter its content over the wishes of the initial speaker. While we believe it has been demonstrated that the $5,000 limitation is closely and necessarily related to the legitimate and important objective of regulating campaign contributions, we disagree with the appellants' use of *Buckley's* close scrutiny of expenditure limits to attack the limits on payments to multicandidate political action committees here at issue.

In *Buckley*, it was evident at each point of the Court's analysis that far greater deference was given to legislative balancing in the sphere of contribution regulation than in the case of limitations on expenditures unrelated to contributions. *See* 424 U.S. at 44-45 ("markedly greater burden" of expenditure limits requires stronger justification than contribution limits under "exacting scrutiny applicable to limitations on core First Amendment rights"). This follows from the Court's conclusions that contributions are somewhat removed from the core of political expression.

In *Buckley* the Court granted the legislature substantial deference in drawing the Act's contribution limits, without insisting upon the most narrow of categories. The Court was willing to assume that contributions in sums larger than $1,000 might in some cases be nonsuspect, but nevertheless it allowed the limit as a preventive measure. 424 U.S. at 28, 30. The Court noted also that groups could circumvent the contribution limit merely by proliferating the number of political committees, each of which would be able to make the maximum candidate contributions; yet this imprecision was permitted.[6] Finally, the Court acknowledged that challengers and minority party candidates might be adversely affected by the contribution limitations. This is a most sensitive point in the integrity of the electoral process.[7] The Court nevertheless permitted the legislation to stand, at least absent a showing of actual prejudice. It is powerful evidence that contribution limitations are a minimal intrusion upon the essentials of political speech that the Court found the Act constitutional despite these imprecisions in its operation. The limits at issue here are at least as "closely drawn," 424 U.S. at 25, as those sustained in *Buckley*. The scrutiny given to a classification affecting a constitutional right is not, therefore, entirely a mechanical inquiry, determined in the abstract simply by

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[6]*See* 424 U.S. at 28 n.31. This loophole has since been closed. *See* 2 U.S.C. § 441a(a)(5) (1976).

[7]A complete discussion of this discriminatory effect and the level of scrutiny ordinarily applicable thereto is found in Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis. L. Rev. 323, 346-57. *See* Comment, Buckley v. Valeo: *The Supreme Court and Federal Election Campaign Reform*, 76 Colum. L. Rev. 852, 863-64 (1976).

reference to which constitutional amendment is being considered. *Buckley* establishes that the constitutional justification required depends in part upon the degree to which the essentials of a constitutional right are exposed to regulation in the particular case.[8]

We are prepared to assume that a restriction on payments to a political committee does make association slightly less convenient. *But see* 424 U.S. at 22 (inconveniencing effect of candidate contribution limits not unconstitutional because substantially equivalent forms of association still available). We think, therefore, it could not be sustained absent demonstration of a discernible, important, and legitimate policy of the Congress. We find such a policy inherent in the structure of the Act. The Act prohibits excessive contributions to candidates and the $5,000 limit properly viewed, is a proper mechanism to insure compliance with the prohibition as well as to prevent multicandidate political committees from being thrust by the statute into a position of such prominence that the legitimate objectives of the statute are defeated. The restrictions on contributions to multicandidate political committees are to prevent the fact or appearance of excessive ties between

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[8]There is some dispute over whether the different conclusions about different types of regulation in *Buckley* were the product of different levels of scrutiny, *see The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 178-79 (1976), or rather the product of the same analysis but with different results based on application to different regulations, *see* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 Yale L.J. 953, 961-62 (1977). The distinction is narrowly semantic, but we assume the latter. *See* Comment, *supra* note 7, at 863-64.

a committee or its donors, on the one hand, and direct contributions to candidates on the other.

The minimal nature of the statutory constraints, taken together with the importance of the governmental interest to be served by the regulation, operate to sustain the constitutionality of the provision in question.

III

Administrative Support to Political Committees

The appellants argue that even if the $5,000 limitation is valid, the FEC's interpretation of the Act is incorrect in another respect because it imposes a particular burden on an association's advocacy not imposed upon the advocacy permitted corporations and unions. As interpreted by the FEC, the Act operates so that any administrative support given by an association such as CMA to a political committee is counted as a contribution subject to the Act's limits, whereas unions and corporations can provide administrative support in unlimited amounts to their segregated funds. The provision which grants unions and corporations this exemption is section 431(e)(5)(F). Appellants challenge the FEC's interpretation and claim they too are entitled to give unlimited administrative support to a political committee. The appellants argue further that even if the FEC's statutory interpretation were correct, denial of the exemption to associations is burdensome and discriminatory and thus violates their first amendment right of speech and their fifth amendment right to be free of classifications that offend due process. The entire court agrees that appellants' statutory argument is unwarranted, and the major-

ity rejects most emphatically the conclusion that associations are burdened in a way that corporations and unions are not and that the distinctions render the limitation provision unconstitutional.

We turn first to the question of statutory interpretation. A "separate segregated fund" is simply a subspecies of political committee. All parties concede this. While the statute was ambiguous on this point at one time, recent amendments have clarified the Act, and it now provides specifically that segregated funds are political committees. *See* Pub. L. No. 96-187, tit. 1, § 301(4)(B), 93 Stat. 1339 (1980), *reprinted in* [1979] U.S. Code Cong. & Ad. News.

The concept of a "separate segregated fund" for corporations and unions was introduced as part of the Federal Election Campaign Act of 1971.[9] Prior to this enactment, corporations and unions were simply prohibited from spending money directly or indirectly to influence federal elections. The exception was the work of Representative Hansen. The Hansen Amendment in 1971 allowed corporations and unions to help certain persons affiliated with them in interest to organize and to participate in political spending, while direct corporate and union participation in influencing elections remained prohibited. Contributions or expenditures by corporations and unions remained unlawful, but the Hansen Amendment permitted "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C) (1976). The legislative

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[9]Pub. L. 92-225, 86 Stat. 3 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3.

history of this amendment is nearly nonexistent,[10] but the general purpose seems to have been to continue the prohibition against vast corporate or union revenues being used in active electioneering while permitting the practice, which had persisted even before the Hansen Amendment specifically permitted it, of a corporation's or a union's serving as a focal point for the interests of closely affiliated persons. Thus, a corporation or union could serve as a clearinghouse to facilitate individual or pooled individual political participation, but could not participate itself.

The question, raised by appellants, whether or not organizations such as CMA can be embraced by the phrase "membership organizations," thus falling within the exemption for unlimited administrative support under sections 431(e)(5)(F) and 441b(b)(2)(C), must be answered in the negative, at least in the sense that appellants ask it. The legislative history indicates that the "membership organizations" language was only intended to rescue organizations that would otherwise fall within section 441b's blanket prohibition of any election activity; CMA

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[10]*See* Comment, *Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976,* 26 Cath. U.L. Rev. 756, 761-62 (1977). The Hansen Amendment was overshadowed by the 1971 Act's far more controversial limits on candidates' media spending. What little authoritative interpretation that there is of the Hansen Amendment's purpose can be gleaned from three sources: brief floor debate, *see* 117 Cong. Rec. 43,379-81 (1971); the Supreme Court's nearly contemporaneous construction of the amendment in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972), and the Federal Election Commission's *Sun Oil* advisory opinion, F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975).

is not such an organization.[11] This interpretation, moreover, is consistent with the FEC's own interpretation of the statute, and we owe deference to the agency that administers the Act. *See Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979).

We do not agree with the appellants' suggested interpretation of the statute under which an association would be entitled to furnish unlimited administrative support to a political committee. Associations are limited in the contributions that they may make to political committees by the terms of section 441a(a)(1)(C). The term "contribution" is defined in section 431e. That definitional section does provide an exemption for administrative support, but by its terms the exemption is confined only to "a corporation or a labor organization." Under no permissible interpretation of this statute can we conclude that associations, such as CMA, are within this exclusion. We agree, therefore, that the value of administrative services donated by an association to a political committee is included in computation of contributions for purposes of the $5,000 limit imposed by section 441a.

We turn finally to appellants' arguments that they are disadvantaged vis-à-vis a union or a corporation. The reason Congress did not provide an unlimited exemption for an association to render administrative services to political committees, while a somewhat similar exemption was granted to corporations and unions for segregated

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[11] *See, e.g.,* 122 Cong. Rec. 7197-98 (1976) (remarks of Sen. Allen, author of amendment).

funds,[12] is that an association is regulated for entirely different purposes and by an entirely different statutory scheme from the one applicable to corporations and unions. *See generally* F. Hilder & T. Watkins, Regulation of Corporate Political Activity (BNA Corporate Practice Series No. 16, 1979). It is quite beside the point to argue that ". . . unincorporated associations may annually donate no more than $5,000 in money or administrative support to political committees, while corporations and labor organizations may annually give such committees unlimited administrative support." The phrase "such committees" obscures the fact that a committee in the case of a corporation or union means only a segregated fund. The fundamental distinction between the regulatory scheme applied to segregated funds maintained by corporations or unions, on the one hand, and the operation of political committees funded by associations on the other, prevents simple comparison between the two. This misapprehension leads to an entirely false issue, *i.e.*, an attempted comparison between these entities. The false comparison cannot be used to declare a major portion of the Act unconstitutional.

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[12]Title 11 C.F.R. § 114.1(b) (1979) and F.E.C. Advisory Opinion 1978-13, *reprinted in* [1978] Fed. Election Campaign Financing Guide (CCH) ¶ 5319, do support this interpretation of the "establishment, administration, and solicitation" language of § 441b (b)(2)(C). It might have been more appropriate for the FEC to construe this language narrowly, such as by interpreting "administration" to mean the supplying of legal and accounting services necessary to comply with the Act. This would retain a parity between incorporated and unincorporated associations, because the latter can also supply these services to an unlimited extent. *See* 2 U.S.C. § 431(e)(4) (1976).

Without the exemption for administrative support, corporations and unions simply could not maintain segregated funds. But segregated funds are different from all other kinds of political committees. Segregated funds can be maintained only for individuals in a narrowly defined class, solicited under the Act's severe restrictions. A corporation or union may solicit only for its own segregated fund, and even then solicitation is restricted in other respects, *e.g.*, solicitations are permitted only twice a year. 2 U.S.C. § 441b(b)(4)(B) (1976).

Corporations and unions, moreover, are flatly forbidden by the Act to make any expenditures or contributions to influence federal elections. By contrast, associations can spend unlimited amounts. Associations may also make unlimited solicitations for contributions to political committees. A solicitation may run to all persons without restriction. Any comparison between the rule that allows corporations and unions to maintain a segregated fund, on the one hand, and the rule that administrative support is counted toward an association's committee contribution on the other, is entirely misplaced. It is not true a priori or from the face of the Act, and we doubt that it can be shown empirically, that corporations or unions by use of segregated funds can match in any degree the power of associations to influence federal elections, whether or not associations choose to exercise that power alone, or through political committees. The comparison is inapt, and no constitutional discrimination or first amendment burden or

injury can be demonstrated from the differential treatment.[13]

The rule that administrative assistance from an association is counted as a contribution when rendered to a political committee would, of course, be invalid if it did not serve a legitimate purpose, and therefore it must be examined under its own terms, even if it is not invalid by comparison to the restrictions upon a union and a corporation. We have already concluded that there is a legitimate purpose for a limit on an association's contributions to political committees. The administrative assistance provisions are simply a necessary part of this statutory scheme. The Act prevents evasion by including administrative assistance in computation of the dollar limit. Since there is a valid purpose in limiting such contributions, the Act's inclusion of administrative support as part of contribution limits is a proper concomitant regulation and is constitutional. The claims of the appellants are therefore rejected, and each of the certified questions is answered in the negative.

IV

The questions we have addressed were certified in accordance with a procedural section of the Act, 2 U.S.C. § 437h, which additionally states that "all questions of constitutionality of this Act" shall be heard by "the United States court of appeals for the circuit involved, which shall hear

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[13]Any suggestion that our approval of the different regulatory mechansims used in the case of corporations and labor unions, on the one hand, and associations, on the other, is the same as the impermissible "differential muffling" that was disapproved in *First National Bank, supra,* 435 U.S. at 788-92, rests on an inapposite analogy between the issues and holdings in that case and in ours.

the matter sitting en banc." Various difficult questions can be raised about the meaning and constitutionality of the section's en banc requirement. These include the extent to which the breadth of the statutory phrase "all questions of constitutionality" may trench upon a court's independence in the manner and scope of its decisionmaking. *See generally* Leventhal, *Courts and Political Thickets,* 77 Colum. L. Rev. 345 (1977); Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. Pa. L. Rev. 45 (1975). The suggestion in Judge Wallace's concurring opinion that a proper construction of the language is to limit en banc hearings to cases presenting issues of "facial" validity, contrasted with "as applied" validity, does not avoid difficult constitutional questions, and it may compound them. In any case, an analysis that is "facial" and yet which purports to answer certified questions concerning CMA only is an anomaly. The negative implication that filing a 437h certificate confines the court to a range of questions more narrow than might otherwise be the case is troubling. The distinction between facial issues and other issues, moreover, is an unstable juridical category. The difficulties it presents are sufficiently metaphysical that the occasions to draw such fine lines should not be multiplied beyond necessity. *See Lewis v. City of New Orleans,* 415 U.S. 130 (1974); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 637-40 (2d ed. 1973).

Construction of section 437h is further hampered by the obscurity of its purpose. It originated as an amendment offered by Senator Buckley to expedite authoritative Supreme Court determination of the Act's constitutionality. The en banc requirement apparently was deemed to be an expediting mechanism due to a misconception that an en banc hearing was a matter of right following a hearing by a panel of three appellate judges; to require an initial en banc hearing was thus thought to eliminate a merely "preliminary" three-judge hearing. *See* Markup—Federal Election Campaign Act Amendments of 1974, Transcript of Proceedings Before the House Comm. on House Admin., 704-11 (June 26, 1974), *reprinted* in Appendix to Appellees' Brief. That proposition is, of course, inaccurate: en banc hearings are discretionary. *See* Fed. R. App. P. 35(a). It has been suggested that the effect of an en banc requirement may be to impede rather than expedite. *See* Leventhal, *supra,* 77 Colum. L. Rev. at 384-87. We are not prepared to say that has occurred in the instant case, but if mandatory en banc hearings were multiplied, the effect on the calendars of this court as to such matters and as to all other business might be severe and disruptive.

Delicate questions such as those here suggested are to be decided only when necessary. We think the better course is to let our decision to hear the case en banc rest on our authority under Fed. R. App. P. 35. *See Buckley v. Valeo,* 519 F.2d 821, 902 n.2 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976) (per curiam). The importance of the case warrants that determination. If Congress in its legislative discretion chooses

to reexamine the en banc provision, the necessity for our addressing the point may not arise in any future case.

The foregoing explains our decision to hear the case en banc pursuant to our authority under Fed. R. App. P. 35.

Judges Wright, Goodwin, Sneed, and Tang join in all parts of the foregoing opinion, for a majority of the court.

Judges Choy and Hug concur only in Part IV.

California Medical Association, et al. v. Federal Election Commission, et al., No. 79-4426

[Filed May 23, 1980]

CHOY, Circuit Judge, concurring and dissenting:

I concur with the majority's position regarding the procedure by which we took this case en banc. On the merits, I concur with the analysis made in Judge Wallace's dissent. He, however, would declare § 441a(a)(1)(C) unconstitutional in its entirety; I would hold that it is unconstitutional only as to unincorporated associations.

Since Judge Wallace's analysis relies heavily upon freedom of association, I am not certain that the statute is unconstitutional as to all persons—in particular, as to individuals. Therefore, my opinion is that we should leave for another day the question whether § 441a(a)(1)(C) also is unconstitutional as to individuals and other "persons." We should not, in a Presidential election year, tinker unnecessarily with the elaborate electoral machinery Congress has erected. We would be guilty of such needless tinkering if for no substantial reason we struck down on a constitutional ground, without the benefit of briefing or argument by directly interested parties, portions of the statutory scheme that might well be constitutional.

Judge Wallace argues that Congress limited our review under § 437h to questions of facial constitutionality, and that therefore the only way to grant CMA relief is to strike down § 441a(a)(1)(C) in its entirety—or, which is to say the same thing, to strike the word "person" out of § 441a (a)(1)(C), leaving nothing of meaning or effect. Since

CMA is entitled to relief, Judge Wallace feels obligated to strike down § 441a(a)(1)(C) not only as to CMA and other unincorporated associations, but also as to individuals, partnerships, etc.

Whether we are confined to questions of facial constitutionality when a district court enters an order pursuant to § 437h but we decide to take the case en banc pursuant to 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a), is a question that I need not reach. My analysis of this case, like Judge Wallace's, is "facial," and falls within the boundaries of any limitation that might be contained in § 437h.

"Facial" analysis tests the constitutionality of the work of the legislative branch by considering the statutory rule in the abstract, without regard to any particular factual situation. "As applied" analysis, on the hand, tests the constitutionality of the work of the executive branch by considering the statutory rule as it has been applied in a specific factual situation. Since Judge Wallace's and my analysis of the merits applies to all unincorporated associations and does not depend on any specific factual circumstance concerning CMA, it is "facial."

Section 441a(a)(1)(C) says, "No person shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000." Section 431(h) defines "person" to include "an individual, partnership committee, association, corporation, labor organization, and any other organization or group of persons." If § 441a(a)(1)(C) actually read, "No *individual, partnership, committee, association, corporation, labor or-*

ganization, and any other organization or group of persons shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000," and if the statute were unconstitutional only as to "associations," everyone would agree that even a court limited to "facial" review could easily sever the offending word and leave the rest of the statute intact.[1] But § 431(h) tells us that the word "person" is the absolute equivalent of the underlined words in my hypothetical statute. Is § 441a(a)(1)(C) not then the equivalent of my hypothetical one?

In conclusion, if Judge Wallace's position on the merits prevailed, it would be desirable to limit to unincorporated associations the holding that § 441a(a)(1)(C) was unconstitutional. This limitation would not be forbidden by § 437h's restriction of our deliberations to questions of facial validity, even if such a restriction was applicable in this case.

HERBERT J. C. CHOY

/s/ Herbert J. C. Choy
United States Circuit Judge

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[1]This would be even more obvious if there were several separate statutes, one for each of the specified categories of "persons" and one catchall statute.

CMA v. FEC, et al.
No. 79-4426

[Filed May 23, 1980]

WALLACE, J., concurring and dissenting:

This case arises from the district court's order, entered pursuant to 2 U.S.C. § 437h,[1] certifying questions as to the constitutionality of certain provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-455. Plaintiffs are the California Medical Association (CMA), an unincorporated association; California Medical Political Action Committee (CALPAC), its political action committee; and two members of both organizations, Sidney Foster, and E. Kash Rose. Defendants are the Federal Election Commission (FEC) and its members. After the

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[1]Section 437h, *as amended by* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 112(c), 93 Stat. 1366, states as follows:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

FEC commenced an investigation of CMA and CALPAC, plaintiffs sued in district court for a declaration that FECA sections 441a(a)(1)(C), 441b(b)(2)(C), 431(e)(5)(F), and 431(f)(4)(H), which prevent a person, including an unincorporated association, from contributing more than $5,000 per year to a political committee, but permit unlimited administrative support of such committees by labor organizations and corporations, are unconstitutional.

The certified questions, in summary, are (1) whether on the face of the statute, and as applied to CMA and CALPAC, the $5,000 per year restriction on support of a political action committee by an unincorporated association violates the plaintiffs' First Amendment rights to speech and association; and (2) whether on its face, and as applied to CMA and CALPAC, this $5,000 restriction, which applies to unincorporated associations but not to corporations or labor organizations, constitutes invidious discrimination in violation of the Fifth Amendment. In addition, we asked the parties to brief and argue the constitutionality of the portion of 2 U.S.C. § 437(h) which requires the United States Court of Appeals to hear this matter sitting en banc.

I believe the majority errs both on the merits and in its failure to come to grips with important and difficult jurisdictional issues which this case presents. I treat first the important questions raised by the majority's use of section 437h(a) to supply our interlocutory jurisdiction to decide the questions certified to us by the district court. Although I agree with the majority that we do have jurisdiction to answer the certified questions, my analysis leads me to confront and to discuss the difficult constitutional issues posed

by Congress' requirement in 2 U.S.C. § 437h(a) that we hear this case while sitting en banc. I next address the question of standing and agree with the majority, for the reasons stated, that at least two plaintiffs have standing. I then explain why I cannot agree with the majority's decision on the merits.

I.

The majority, without substantial reasoning, decides not to resolve a critical question pertaining to our jurisdiction. This issue is so fundamental to our authority to act that it must be faced squarely.

It is true that a majority of our court concluded, after this case was heard en banc, to dispose of this matter pursuant to 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a). Once the question of the constitutionality of the en banc mandate embodied in section 437h(a) is removed, however, I doubt that enough remains in this case to present "a question of exceptional importance" to satisfy Rule 35(a).[2] Nor does this case present special needs for uniformity.

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[2]I know of no principled basis on which to distinguish this case from many politically volatile matters that three-judge panels of this circuit normally confront. Suppose that the next constitutional challenge to a FECA regulation occurs outside of an election year. Will the issue still be of "exceptional importance"? If not, is our principled basis for the importance of a *case* to be governed by an election calendar? What makes the constitutional issues posed in the case before us so different in kind as to require such special treatment? Why should some perceived need for haste in the instant case counsel use of the unwieldly and extremely time-consuming en banc procedure? Absent intra-circuit conflict, I had thought that the en banc procedure, and the prolonged, careful deliberation that should accompany it, would be reserved for cases of great moment.

In addition, I question the court's curious technique of invoking section 437h(a) to confer jurisdiction over this interlocutory appeal and yet ignoring that section's simultaneous and clear command that we *shall* hear this appeal while sitting en banc. Once section 437h(a) is invoked, I think we must apply it in its entirety. The court's midstream switch from section 437h(a)'s explicit en banc mandate to the convenient, but irrelevant, en banc discretion provided in 28 U.S.C. § 46(c) and Rule 35(a), ignores an integral and inseparable aspect of the very basis for our jurisdiction.

Accordingly, I believe we must act pursuant to section 437h(a), and address the problems raised by Congress' imposition in that section of the en banc requirement. I would hold that section 437h(a) limits our review to the facial constitutionality of FECA provisions. I confess my difficulty in understanding the majority's criticism of a facial/as applied analysis. I find it neither an "unstable judicial category" nor "metaphysical," nor do I find in the majority opinion any analysis or authority to support such naked assertions. My reasons for my position emanate from my interpretation of section 437h(a). The statute does not contemplate an expedited, en banc consideration of the constitutionality of FECA provisions as applied to particular defendants. So limited, I would find section 437h(a) constitutional: Congress may constitutionally require this circuit to hear such facial challenges en banc, provided that, as here, we would not be required to exceed Article III's limitation on federal judicial power.

A

Section 437h(a) states: "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." I first consider whether this provision permits expedited review of "as applied" challenges, in addition to facial challenges. The wording itself, which speaks only of the "constitutionality of this Act," is inconclusive. Thus, it is necessary to resort to legislative history to interpret the statute. *See United States v. Rone,* 598 F.2d 564, 569 (9th Cir. 1979).

Section 437h was part of the 1974 amendments to the Federal Election Campaign Act of 1971. As originally introduced in Congress, as S. 3044 and H.R. 16090, the 1974 amendments did not contain the expedited review mechanism now set forth in section 437h. That provision was introduced by Senator Buckley as a floor amendment to S. 3044 during the Senate debates. Upon presenting the amendment, Senator Buckley stated that it

> merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a *serious question as to the constitutionality of this legislation,* it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562 (1974) (remarks of Sen. Buckley) *reprinted in* FEC, *Legislative History of Federal Election Campaign Act Amendments of 1974,* 499 (1977) [hereinafter cited as *1974 Legislative History*] (emphasis added).

Apparently Senator Buckley was chiefly concerned with the First Amendment problems associated with the bill's expenditure limitations. *See* 120 Cong. Rec. 10558-64 (1974), *reprinted in 1974 Legislative History* at 494-99. *Cf. Buckley v. Valeo,* 424 U.S. 1, 39-59 (1976) (per curiam) (FECA's independent expenditure limitations violate First Amendment). His stated purpose was to enable expeditious review of this "serious" constitutional question—the constitutionality, on their face, of the expenditure limitations.

The Buckley Amendment (which was inserted in both S. 3044 and H.R. 16090) was subsequently modified. As originally worded, the amendment authorized actions in the district court, reviewable on certification to the court of appeals en banc, "to implement or construe any provision of the Act . . . ." 120 Cong. Rec. 10562 (1974), *reprinted in 1974 Legislative History* at 499. The Conference Committee limited the scope of the provision by eliminating actions merely "to implement" the Act. The Committee stated:

> The conference substitute generally follows the House amendment and makes it clear that these special judicial review provisions are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, related to the activities regulated by the Act.

S. Conf. Rep. No. 1237, 93d Cong., 2d Sess. 96 (1974), *reprinted in 1974 Legislative History* at 499.

Senator Buckley's concern with the serious First Amendment issues raised by the legislation, and the Conference Committee's apparent intent to limit the scope of section 437h(a) to "actions directed at determining the constitu-

tionality of provisions of the Act," indicate that Congress intended to limit judicial review pursuant to section 437h (a) to questions of FECA's constitutionality on its face. This conclusion regarding Congress' intent is apparently shared by the District of Columbia Circuit. In *Buckley v. Valeo,* 519 F.2d 821, 850-51 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part,* 424 U.S. 1 (1976) (per curiam), the court stated:

> Congress was concerned with the inhibitory effect of a massive rearrangement of regulations operating upon federal campaigns and elections, and wanted election participants to be permitted expeditiously to test the *facial* validity of limitations and requirements imposed by the challenged Acts.

(Footnote omitted; emphasis added.)[3]

Congress' intent to limit section 437h(a) to facial challenges is further evidenced by the alternate avenue of judicial review contained in FECA's civil enforcement procedures. Section 437g(a) (*as amended by* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 309, 93 Stat. 1358) creates a civil complaint mechanism

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[3]The District of Columbia Circuit in *Buckley,* like the majority, did not reach the question which I believe must be confronted: whether the procedure provided in section 437h(a) is constitutional. It "took care"

> to base its decision to hear the case *en banc* upon Rule 35(a) of the Federal Rules of Appellate Procedure and upon the statutory enactment of long-standing judicial custom, 28 U.S.C. § 46(c), so as not to foreclose later argument under separation of powers that Congress may not compel a sitting en banc, as the plain words of § 437h would imply.

Buckley v. Valeo, 519 F.2d 821, 902 n.2 (D.C. Cir. 1975) (per curiam), *aff'd in part,* 424 U.S. 1 (1976) (per curiam).

administered by the FEC and enforceable, if necessary, in the district court. Section 437(g)(a)(9) also provides for relief in the district court for those parties aggrieved by FEC enforcement orders. As to both enforcement of or relief from FEC actions, section 437g(a)(10)-(12) provides for expedited district court review (ahead of all actions save those brought pursuant to section 437h), and for appellate review. In the case before us, a section 437g(a) enforcement proceeding is presently pending.[4]

I do not think Congress intended section 437h(a) to preempt the section 437g(a) enforcement and relief procedures, in which "as applied" constitutional issues can be resolved on the complete factual record of particular transactions. Section 437g(a)(11) provides that section 437h(a) actions are docketed ahead of section 437g(a) enforcement and relief actions. This, of course, avoids the unnecessary expense and delay involved in factual determinations, as well as wasted judicial effort, whenever the charging provisions are found to be facially unconstitutional on certification to the court of appeals.[5] But nothing in the legislative

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[4]The FEC investigation commenced in 1978. The FEC determined, on April 19, 1979, that there was probable cause to believe CMA and CALPAC had violated these provisions. The plaintiffs filed the instant action on May 7, 1979. The FEC filed its civil enforcement action against CMA and CALPAC in district court 16 days later.

[5]During the House discussion of the Conference Committee Report, Committee Chairman Hays recognized Congress' careful balancing of the avenues of judicial review available under the enforcement mechanism and section 437h. He stated:

> Under section 315 [codified as 2 U.S.C. § 437h] persons challenging the constitutionality of any provision of the act, retain their right to do so in court without exhausting administrative remedies to the extent the courts have jurisdiction under es-

history even hints that Congress intended section 437h to supplant the FECA civil enforcement and relief procedures for specific violations.[6]

An additional reason for concluding that Congress intended to limit this court's section 437h(a) review to the constitutionality of FECA provisions on their face is Congress' requirement that we must hear such challenges en banc. The significance of this requirement can best be demonstrated by a brief review of the development and implementation of the en banc procedure. Hearings en banc were implemented *sua sponte* by some circuit courts in the late 1930's in response to increases in the number of judges per circuit and the concomitant potential for intra-circuit conflicts. *See Textile Mills Sec. Corp. v. Comm'r of Internal Revenue,* 314 U.S. 326, 327-35 (1941). In the *Textile Mills* case, the Supreme Court approved this use of en banc proceedings. *Id.* Thereafter, Congress enacted 28 U.S.C. § 46,[7] which codified the *Textile Mills* decision by

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tablished principles. The delicately balanced scheme of procedures and remedies set out in the act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.

120 Cong. Rec. 35134 (1974), *reprinted in 1974 Legislative History* at 1108.

[6]District courts have similarly viewed the interaction of section 437h(a) and the enforcement mechanisms. *See, e.g., Martin Tractor Co. v. FEC,* 460 F. Supp. 1017, 1019 (D.D.C. 1978); *United States v. Clifford,* 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976).

[7]28 U.S.C. § 46(c) now states:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.

authorizing a majority of the active judges on a circuit to order an en banc hearing.

Guidelines for en banc procedures are now set forth in rule 35(a) of the Federal Rules of Appellate Procedure:[8]

> (a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Thus, en banc proceedings pursuant to the authority of 28 U.S.C. § 46 are afforded only to promote or secure uniformity within a circuit or in cases of exceptional importance. *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *United States v. American-Foreign SS. Corp.*, 363 U.S. 685, 689 (1960).

In enacting 2 U.S.C. § 437h(a), Congress legislated against this en banc background. Although I would not hold, as an original matter, that the questions posed by this case are of such "exceptional importance" as to warrant ad hoc en banc treatment pursuant to 28 U.S.C. § 46(c) and

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[8]The Rules of Appellate Procedure are promulgated by the Supreme Court pursuant to its authority under 28 U.S.C. §§ 2072, 2075 and 18 U.S.C. §§ 3771, 3772 "to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals," Fed. R. App. P. 1, Notes of Advisory Committee on Appellate Rules.

Rule 35(a), Congress could find that, in general, challenges to the facial constitutionality of FECA provisions are sufficiently important to require en banc treatment. Judgments as to facial constitutionality necessarily have wide-ranging impact. In contrast, individual enforcement proceedings, while perhaps of transcendent importance to the particular parties involved, do not present issues of such national significance. Senator Buckley's concern was to expedite judicial resolution of the "serious question" of the constitutionality of certain FECA provisions. *See* 120 Cong. Reg. 10562 (1974), *reprinted in 1974 Legislative History* at 499. The use in section 437h(a) of the en banc procedure to entertain such "serious questions" of facial constitutionality is not inconsistent with the "exceptional importance" limitations historically placed upon the en banc procedure.[9] There is no evidence of congressional intent to abrogate these limitations, which are based on sound principles of judicial administration. I would interpret section 437h(a), in light of the legislative history already reviewed, as expressive of congressional intent that we limit our review to FECA's facial constitutionality. It is therefore necessary to consider whether Congress constitutionally can require this court to decide questions of FECA's facial constitutionality while sitting en banc.

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[9]I am aware of only one statute other than 2 U.S.C. § 437h(a) and 28 U.S.C. § 46 in which Congress has authorized en banc proceedings. 28 U.S.C. § 2109, enacted simultaneously with section 46, provides for en banc convocation of the appropriate court of appeals, at the Chief Justice's discretion, to hear a case brought to the Supreme Court on direct appeal from a district court when the Supreme Court lacks a quorum. This rarely used provision is not inconsistent with the general rule that en banc hearings are confined to "exceptional" cases.

B

Article III of the Constitution empowers Congress to ordain and establish inferior courts of appellate jurisdiction and to limit and regulate the Supreme Court's appellate jurisdiction. U.S. Const. art III, §§ 1, 2 cl.2; *Ex Parte McCardle,* 74 U.S. (7 Wall.) 506, 513 (1869); *see Palmore v. United States,* 411 U.S. 389, 400-01 (1973). Although Congress has generally delegated to the judiciary the power to make rules governing judicial practice and procedure, the final authority for rulemaking rests ultimately with Congress. *Hanna v. Plumer,* 380 U.S. 460, 472 (1965); *Sibbach v. Wilson & Co.,* 312 U.S. 1, 9-10 (1941).

There are, however, some limits on congressional authority over the judiciary; for example, Congress may not undermine the courts' capacity to make independent determinations of questions of law or fact in particular cases. *Crowell v. Benson,* 285 U.S. 22, 60 (1932). *See also United States v. Klein,* 80 U.S. (13 Wall.) 128, 147 (1872) (statute compelling court to ignore certain evidence which court believed to be relevant "passed the limit which separates the legislative from the judicial power"). Commentators have suggested that Congress' power to limit and regulate federal appellate jurisdiction is circumscribed by the doctrine of separation of powers and the Fifth Amendment's due process clause. It has been urged, for example, that Congress may not make such exceptions to appellate jurisdiction "as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1365 (1953). *See generally* Ratner, *Congressional Power over the Appel-*

late Jurisdiction over the Supreme Court, 109 U. Pa. L. Rev. 157 (1960). Others believe that in cases where "due process is . . . judicial process," *Crowell v. Benson, supra,* 285 U.S. at 87 (Brandeis, J., dissenting), the Fifth Amendment prevents Congress from closing off all avenues of judicial relief. *See generally* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 Yale L. J. 498 (1974); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. Pa. L. Rev. 45 (1975). Were Congress to require en banc facial review in many additional categories of cases, or, under FECA, in "as applied" cases, the workload of the courts of appeals might become so burdensome, and our backlog so overwhelming to litigants, that our capacity to provide adequate judicial process would be unconstitutionally threatened. But the present mandate commands us only to decide facial questions, once and for all, in a single en banc proceeding. The line beyond which congressional regulation of judicial procedure and jurisdiction unconstitutionally constrains the judicial function remains very hazy. I think it is clear, however, that Congress can require us to sit en banc to hear and decide questions of FECA's facial constitutionality without undermining the separation of powers contemplated by Article III or our capacity to afford the due process required by the Fifth Amendment. The wisdom of this en banc mandate is debatable,[10] but it is not unconstitutional.

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[10]*See* Leventhal, *Courts and Political Thickets,* 77 Col. L. Rev. 345, 384-87 (en banc hearings are counterproductive in terms of expediting determination of serious constitutional questions).

II

Having concluded that we have power to hear this appeal, I turn next to the question of whether the plaintiffs have standing to bring this controversy before us. Without analysis, the majority summarily states a naked conclusion. The issue deserves more.

In *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (per curiam), the Supreme Court held that "Congress, in enacting 2 U.S.C. § 437h . . . intended to provide judicial review to the extent permitted by Art. III." (Footnote omitted.) Our jurisdiction under section 437h(a) is thus constrained only by Article III's "cases and controversies" limitation. Prudential limitations are not applicable.[11] Accordingly, it is necessary to ascertain whether any of the plaintiffs

> have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged

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[11]The District of Columbia Circuit has stated that section 437h(a) does not vitiate the various prudential standing considerations which limit the federal courts' exercise of decisional and remedial powers. *Clark v. Valeo*, 559 F.2d 642, 650 n.11 (D.C. Cir.) (per curiam) (Congress cannot "command" the judiciary to act contrary to prudential ripeness rules), *aff'd sub nom., Clark v. Kimmitt*, 431 U.S. 950 (1977). *Cf. Clark v. Valeo, supra*, 559 F.2d at 660-64 (Leventhal, J., concurring) (actions for declaratory relief brought pursuant to section 437h are subject to those concerns, including ripeness, inherent in equity jurisdiction); Leventhal, *Courts and Political Thickets*, 77 Col. L. Rev. 345, 387 (1977) (prudential considerations available to prevent "undercutting of fundamentals of the judicial process"). *Contra, Clark v. Valeo, supra*, 559 F.2d at 669 (Robinson, J., dissenting) ("[Section 437h] is coextensive with the constitutional maximum of adjudicative authority, observing no limit save the existence of a case or controversy. . . . Prudential considerations, so viable in ordinary cases, have no role in disputes cognizable under Section 437h."); *Bread Political Action Comm. v. FEC*, 591 F.2d 29, 34 & n.8 (7th Cir. 1979) (same).

> provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' *Aetna Life Ins. Co. v. Haworth*, [300 U.S. 227], 241 [(1937)].

Id. (footnotes omitted).

Two of the plaintiffs, Foster and Rose, are "individual[s] eligible to vote in any election for the office of President of the United States," 2 U.S.C. § 437h(a), and are thus granted a statutory right to sue pursuant to section 437h(a). Whether either individual has a sufficient personal stake in the outcome of this controversy to meet the Article III requirement must be determined.

Foster and Rose allege that FECA's restriction on CMA's support of CALPAC abridges their First Amendment rights, as members of these organizations, to communicate political ideas and to associate for the purpose of participating in federal elections. The First Amendment freedom of association protects an association's ability to amplify effectively the voices of its adherents. *Buckley v. Valeo, supra*, 424 U.S. at 22; *see NAACP v. Alabama,*

The District of Columbia Circuit's interpretation of section 437h(a) seems to ignore the Supreme Court's statement in *Buckley* that "Congress . . . intended to provide judicial review to the extent permitted by Art. III." *Buckley v. Valeo, supra*, 424 U.S. at 11-12 (footnote omitted). There can be no doubt that Congress can obviate prudential restrictions. As the Supreme Court has explicitly stated, "Congress may grant an express right of standing to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Congress has done so in section 437h(a). I therefore do not consider the effect of prudential limitations in the exercise of jurisdiction in this case.

357 U.S. 449, 460 (1958). Foster and Rose essentially allege that their political voices are unconstitutionally weakened by the FECA restrictions on CMA and CALPAC.

In *Buckley*, the Court invalidated FECA's restrictions on independent (of the candidate) campaign expenditures made in behalf of clearly identified candidates. The Court stated:

> The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression *"is simultaneously an interference with the freedom of* [*their*] *adherents," Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

Buckley v. Valeo, supra, 424 U.S. at 22 (emphasis added). *See also id.* at 75. Thus, FECA's restrictions of CMA and CALPAC, if unconstitutional, interfere directly and simultaneously with their members' First Amendment rights. As such, Foster and Rose have a sufficient personal stake in a judicial ruling on the certified questions to create Article III standing.

Because Foster and Rose have standing, I need not consider the standing of CMA and CALPAC. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). I therefore do not reach the question, on which courts have divided, whether the grant of standing in section 437h(a) is limited to the plaintiffs enumerated therein. *Compare Martin Tractor v. FEC*, 460 F. Supp. 1017, 1019 (D.D.C. 1978) (limited), *with Bread Political Action Committee v. FEC*, 591 F.2d 29, 30-36 (7th Cir. 1979) (not limited).

III

I turn now to the merits. On its face, FECA section 441a(a)(1)(C) prohibits a "person," which includes unincorporated associations, corporations, and labor organizations, 2 U.S.C. § 431(h), from contributing more than $5,000 to any type of political committee other than that of a national political party.[12] Section 441b(b)(2)(C), however, provides corporations and labor organizations with a limited exemption to this prohibition. For all FECA purposes,[13] a contribution or expenditure does not include:

> the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

2 U.S.C. § 441b(b)(2)(C).

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[12]"Persons" also cannot contribute more than $1,000 to any candidate with respect to an election for federal office, 2 U.S.C. § 441a(a)(1)(A), or more than $20,000 per year to a national political party's committee, 2 U.S.C. § 441a(a)(1)(B). Corporations and labor organizations cannot make any direct contributions or expenditures with respect to federal elections. 2 U.S.C. § 441b(a). Thus, corporations and labor organizations, unlike unincorporated associations, may not contribute $1,000 directly to a candidate or $20,000 per year to a national committee. None of these provisions is challenged in the case before us.

[13]The exemption in section 441b(b)(2)(C) applies outside of section 441b, and thus to the contribution limitations in section 441a(a)(1)(C), by virtue of the general definition, for all FECA purposes, of "contribution" in section 431(e)(5)(F). Section 431(e)(5)(F) specifically excludes from the definition of "contribution" any provision of administrative support pursuant to 441b(b)(2)(C). Section 431(f)(4)(H) similarly excludes such administrative support from the definition of expenditures.

Foster and Rose first contend that any constitutional question can be avoided by construing section 441(b)(2)(C) to allow unlimited administrative support by an unincorporated association to its political action committee.[14] The Supreme Court has held that when the validity of an act of Congress is drawn into question and a serious doubt is raised as to its constitutionality, it is a "cardinal principle" that a court should "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *Crowell v. Benson, supra*, 285 U.S. at 62. Unfortunately, the majority does not fully analyze the legislative history underlying this key issue. I have concluded, however, that the majority's ultimate conclusion on this issue is correct. A fair construction of the statute in this case does not permit avoidance of the constitutional issue.[15]

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[14]The term "political committee," as defined in 2 U.S.C. § 431(d), means, among other things, a "separate segregated fund" established pursuant to 2 U.S.C. § 441b(b)(2)(C). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 301(4)(B), 93 Stat. 1339 (amending 2 U.S.C. § 431(d) (1974)). Thus, if section 441b(b)(2)(C) exempted unincorporated associations, they would be permitted to provide unlimited support to political committees such as CALPAC.

[15]The FEC urges that our jurisdiction, pursuant to section 437h(a), to review only questions of facial constitutionality precludes the possibility of a statutory construction to avoid the constitutional question. I disagree. In *Buckley v. Valeo, supra*, the Court, acting pursuant to section 437h, construed FECA's expenditure limitations to avoid an unconstitutional vagueness problem. *See id.* at 40-44. *See also FEC v. Central Long Island Tax Reform Immediately Committee*, No. 79-3014 (2d Cir., filed Feb. 5,

Foster and Rose argue that an unincorporated association, like CMA, is a "membership organization," as referred to in section 441b(b)(2)(C), and therefore is entitled to provide unlimited administrative support in the same manner as a corporation or labor organization. Although the term "membership organization" is nowhere defined in the Act, the term literally describes an unincorporated organization such as CMA. Because corporations are already specifically included within the exception, the addition of the term "membership organization" would, at first blush, seem to encompass unincorporated associations. Despite this facial clarity, the meaning of "membership organization" in section 441b(b)(2)(C) is ambiguous because the subsection applies only for the purposes of section 441b, and section 441b imposes prohibitions only on corporations and labor organizations. Because of this ambiguity, it is necessary to resort to legislative history. *See United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979).

The legislative history of section 441b(b)(2)(C) suggests that Congress did not intend to apply the contribution exclusion to unincorporated associations. When first proposed in 1976 as part of the amendments to the 1971 Act, section 441b made it unlawful for a corporation to solicit contributions from anyone other than a stockholder or from administrative personnel and permitted corporations and labor organizations to provide administrative support to separate political committees. S. 3065, 94th Cong., 2d Sess. § 321 (1976), *reprinted in* FEC, *The Legislative His-*

1980). Moreover, construction and interpretation of a statute are always necessary prior to testing the statute against constitutional requirements; the constitutional issue cannot be framed until the statute is clearly understood.

tory of the Federal Election Campaign Amendments of 1976, 253-54 [hereinafter *1976 Legislative History*].

During the 1976 debate on section 441b, Senator Allen proposed an amendment on the Senate floor. 122 Cong. Rec. 7197-98 (1976), *reprinted in 1976 Legislative History* at 463-64. The amendment provided: first, that membership organizations, cooperatives, or corporations without capital stock could solicit contributions from their members (enacted in 2 U.S.C. § 441b(b)(4)(C)), and second, that these same groups could provide unlimited administrative support to their separate segregated funds (enacted in 2 U.S.C. § 441b(b)(2)(C)). The amendment was passed virtually without discussion, but Senator Allen's own comments[16] suggest that the purpose of his amendment was to allow corporations with a nonstockholding membership to solicit contributions from their members and to establish segregated funds in the same manner as capital stock corporations. 122 Cong. Rec. 7197-98 (1976), *reprinted in 1976 Legislative History* at 463-64. Senator Allen ap-

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[16]In introducing his amendment Senator Allen stated:

> Mr. President, all this amendment does is to cure an omission in the bill. It would allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporations without capital stock and, hence, without stockholders, to set up separate segregated political funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members. That is all that the amendment provides. It does cover an omission in the bill that I believe all agree should be filled.

122 Cong. Rec. 7197-98 (1976), *reprinted in 1976 Legislative History* at 464. *See also* 122 Cong. Rec. 12468-69 (May 4, 1976), *reprinted in 1976 Legislative History* at 1107-08 (Remarks of Sen. Allen).

parently believed that without this amendment such corporations would be unable to solicit on an equal basis with more conventional corporations.

I recognize the persuasiveness of the argument that an unincorporated association such as CMA should be considered a "membership organization." However, the legislative history makes it clear that section 441b(b)(2)(C) was not designed to allow unincorporated associations to provide unlimited administrative support to their political committees. Unincorprated associations were not covered by the prohibitions contained in section 441b. It is evident that Congress, in adopting the Allen amendment, was only interested in assuring that all types of corporations, including those with members rather than stockholders, would come within the administrative assistance exception to the 441b prohibition. Consequently, even though an unincorporated association like CMA is arguably a membership organization, it does not fall within the scope of the administrative support exception contained in section 441b (b)(2)(C).[17]

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[17]Even if one held fast (despite legislative history to the contrary) to the first-blush interpretive premise that the term "membership organization," as used in section 441b(b)(2)(C), includes unincorporated associations, the section 441b(b)(2)(C) exemption would still not enable an unincorporated association to provide unlimited administrative support to a political committee. The obstacle of the $5,000 restriction in section 441a(a)(1)(C) would remain, because sections 431(e)(5)(F) and (f)(4)(H), which exclude corporate and labor donations of administrative support to separate segregated funds from the definitions of "contribution" and "expenditure," do not mention "membership organizations." The result is that "membership organizations," unlike corporations and labor organizations, remain governed by the

IV

Given this reading of section 441b(b)(2)(C), Foster and Rose claim that the $5,000 restriction on contributions by a "person" to a political committee, 2 U.S.C. § 441a(a)(1)(C), when read in light of the administrative support exemption for corporations and labor organizations,[18] is unconstitutional on its face, in that the constitutional infirmity is revealed by examining solely the language of FECA's various provisions. They contend that the restriction abridges the speech and associational freedoms of members of an unincorporated association and its political committee, and does so discriminatorily, in that members of unincorporated associations are restrained as to providing administrative support while members of labor organizations and corporations may freely give administrative support to their political committees.

Although Foster and Rose urge separate First Amendment and equal protection claims, each claim attacks the $5,000 limitation on donations of administrative support to political committees in section 441a(a)(1)(C), a restriction that allegedly impacts directly on fundamental

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$5,000 restriction in section 441a(a)(1)(C) on "contributions" to political committees. I have chosen to rely directly on the legislative history of section 441b(b)(2)(C) rather than on this apparent anomaly in the statutory framework; nevertheless, the omission of the term "membership organization" in sections 431(e)(5)(F) and (f)(4)(H) provides additional support for the conclusion that the section 441b(b)(2)(C) exemption is not available to unincorporated associations.

[18]This administrative support exemption for corporations and labor organizations applies to section 441a(a)(1)(C) by virtue of the section 431(e)(5)(F) and (f)(4)(H) definitions of "contributions" and "expenditures."

speech and associational interests. The paramount evil inherent in discriminatory speech restrictions is that such dissimilar treatment skews the marketplace of ideas and raises the spectre of governmental allocation of speech rights. A hallmark of First Amendment doctrine is the vigorous scrutiny of government actions which, as here, differentiate for purposes of regulation among particular persons' communications. *E.g., Niemotko v. Maryland,* 340 U.S. 268, 272 (1951). I choose, therefore, to analyze section 441a(a)(1)(C)'s different treatment of unincorporated associations on one hand, and labor organizations and corporations on the other, in First Amendment terms. The First Amendment has generated a comprehensive and sensitive jurisprudence concerned exclusively with regulations of speech and association. Although it is hard to describe the rights of speech and association as other than "fundamental," I think that the careful scrutiny dictated by the First Amendment is more appropriate to review of regulations of speech and association than the "fundamental rights" branch of equal protection analysis. Many of the rights in the Bill of Rights are likely fundamental, but as each is specifically protected by an amendment to the Constitution, the wealth of judicial experience in interpreting these specific amendments, and the strict scrutiny they require, should be applied whenever possible.

A

Both parties rely largely upon the Supreme Court's *per curiam* opinion in *Buckley v. Valeo, supra.* In *Buckley,* the Court struck down FECA's ceilings on campaign expenditures by candidates and by third parties on behalf of candidates, but upheld the limitations imposed on "persons"

making contributions directly to candidates and political parties. The $5,000 limit on "persons' " contributions to political committees was enacted after the *Buckley* decision, and thus was not considered by the Court.

The Court in *Buckley* analyzed both the contribution and expenditure limitations solely in First Amendment terms.[19]

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[19]The Court in *Buckley* also considered and rejected the plaintiffs' Fifth Amendment equal protection challenge to FECA's Subtitle H, which provides for public financing of election and primary campaigns. The plaintiffs there contended that the primary financing is unconstitutional because candidates not running in party primaries receive no primary funds. The Court responded:

> In not providing assistance to candidates who do not enter party primaries, Congress has merely chosen to limit at this time the reach of the reforms encompassed in Chapter 96. This Congress could do without constituting the reforms a constitutionally invidious discrimination. The governing principle was stated in *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966):
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> > "[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489."

Buckley v. Valeo, supra, 424 U.S. at 105.

The Court thus accorded the challenged Subtitle H provisions only minimal, "rational basis," scrutiny. The plaintiffs in *Buckley* had argued that the rational basis test used in *Katzenbach v. Morgan* "is inapplicable to this case involving First Amendment guarantees." *Id.* at 105 n.143. But the Court rejected this contention, stating: "[T]he argument as to the denial of funds to certain candidates primarily claims invidious discrimination and hence presents Fifth Amendment questions, though with First Amendment overtones, as in *Katzenbach v. Morgan*." *Id.*

No explicit discrimination considerations were present, because the challenged regulations applied in blanket fashion.[20] The absence of an analogous discrimination issue in

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The reasoning in *Katzenbach* and *Buckley* does not control here. In *Katzenbach*, the Court upheld a statute, enacted pursuant to section 5 of the Fourteenth Amendment, which permitted citizens educated through the sixth grade in American flag schools, but who did not speak English, to vote. The statute was particularly designed to franchise New York City's Puerto Rican immigrant citizens, many of whom had been educated solely in Spanish in Puerto Rico. The plaintiffs urged that Congress violated the Fifth Amendment by limiting the provision to American flag schools. In deciding to apply minimal scrutiny, the Court said:

> [T]he principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.

Katzenbach v. Morgan, *supra*, 384 U.S. at 657 (emphasis in original). The FECA provisions at issue here, unlike Subtitle H in *Buckley* and the reform measure in *Katzenbach*, are newly imposed barriers to speech, albeit designed to reform national elections. They are positive restrictions on speech and association. The First Amendment overtones were ancillary in *Buckley* (regarding Subtitle H) and in *Katzenbach*, because the challenged statutes did not restrict speech. In the case before us, the First Amendment overtones are paramount; the alleged discrimination is thus properly considered within First Amendment analysis.

[20]The Court in *Buckley* did consider the claim that the contribution restrictions "work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face." *Buckley v. Valeo*, *supra*, 424 U.S. at 30-31 (footnote omitted). But the Court held that, "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. *Cf. James v. Valtierra*, 402 U.S. 137 (1971)." *Id.* at 31. The Court found no evidence of such discrimination in the record, and thus rejected plaintiffs' discrimination contention without defining the appropriate standard of review. *Id.* at 32.

the Court's First Amendment analysis distinguishes *Buckley* from the case before us; nevertheless, the Supreme Court's method of analyzing such similar issues should generally govern our analysis.

The Court in *Buckley* first isolated the speech and associational interests affected by the challenged regulations. The Court stated:

> Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electorial outcomes by placing a ceiling on expenditures for political expression by citizens and groups. . . . [I]t is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

Buckley v. Valeo, supra, 424 U.S. at 17, quoting *United States v. O'Brien,* 391 U.S. 367, 382 (1968). Furthermore, the Court stated that FECA's "constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'" *Id.* at 22, *quoting Sweezy v. New Hampshire, supra,* 354 U.S. at 250 (plurality opinion). Because of FECA's direct regulation of the communicative impact of both speech and association, the Court stated that the chal-

lenged regulations would be tested by "the exacting scrutiny required by the First Amendment." *Id* at 16.[21]

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[21]In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court sustained a war protestor's conviction, pursuant to a federal statute prohibiting the knowing destruction of a draft card, for burning his draft card on the steps of a courthouse. The Court believed that the law prohibiting the destruction of draft cards was "unrelated to the suppression of free expression," *id.* at 377, and that any "incidental restriction on alleged First Amendment freedoms [was] no greater than [was] essential to the furtherance of [the government's] interest," *id.*, in smooth administration of the Selective Service System.

The Court in *Buckley* expressly distinguished *O'Brien* on the basis that FECA's contribution and expenditure regulations, unlike the statute challenged in *O'Brien* arose " 'in some measure because the communication allegedly integral to the conduct [was] itself thought to be harmful.' " *Buckley v. Valeo, supra,* 424 U.S. at 17, *quoting United States v. O'Brien, supra,* 391 U.S. at 382. Therefore, the Court considered the FECA limitations, at least "in some measure," to be directly designed to suppress communication, and hence, free expression.

The expression which Congress hoped to curb by the contribution regulations is, roughly: "Here is $100,000. Now I have your vote in my pocket." Clearly, as in subversive speech, *see Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam), the evil exists in the content of the communication to the candidate. The harm—corruption—flows from the content of the contributor's message. Thus, the Court in *Buckley* correctly distinguished *O'Brien,* in which the harm was not related to the war protestor's message, but rather to his conduct—destruction of a draft card needed by the Selective Service Administration for administrative purposes.

The "exacting scrutiny," *Buckley v. Valeo, supra,* 424 U.S. at 16, accorded legislative curbing of harms flowing from the content of particular persons' or groups' speech does not normally include balancing of government interests against individual speech and association rights. *See,* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv. L. Rev. 1482, 1491 (1975). *Cf. Brandenburg v. Ohio, supra,* 395 U.S. at 447 (state may "proscribe advocacy of use of force or of law violation [only] where such advocacy is

The Court then judged the contribution and expenditure limitations by balancing the particular speech and associational interests affected thereby against the government's interest in having such limitations. The Court found that FECA's expenditure ceilings "impose[d] direct and substantial restraints on the quantity of political speech," *id.* at 39, and "preclude[d] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association," *id.* at 22. In contrast, the Court

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directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). Yet in *Buckley*, even after distinguishing *O'Brien*, the Court implicitly adopted the *O'Brien* method: It weighed and balanced the respective individual and governmental interests and tested the nexus between the government's anti-corruption objective and the means chosen to effectuate it—the contribution and expenditure limitations—by a "less restrictive alternative" (are the means "essential" to the end?) mode of analysis. Of course, even the "categorization" approach which typically describes "exacting scrutiny," *see Cohen v. California*, 403 U.S. 15, 24 (1971), Ely, *supra*, at 1490-93, presupposes some balancing—to find the margins of scrupulously protected categories. *See* L. Tribe, *American Constitutional Law*, § 12-2, at 583 (1978). But I am unaware of any prior instance in which the Court, after describing a government action as related to the suppression of the communicative impacts of speech, asked simply whether the governmental objective was important and whether it could be accomplished less restrictively.

The standard of review actually utilized by the Court in *Buckley* is thus difficult to pinpoint. The Court stated it would use the exacting scrutiny test, but the interest balancing which dominates its analysis leaves me in doubt. I do, of course, follow Supreme Court precedent and, therefore, adopt the balancing approach, which most clearly explains the Court's analysis in *Buckley*. I confess, however, my inability to identify specifically the analytical framework adopted by the Court.

found the contribution limitations to impinge less on speech and associational interests. The Court said:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political campaign entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 20-21. Moreover, although the contribution limitations restricted the ability of "like-minded persons to pool their resources in furtherance of common political goals," *id.* at 22, they did "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.*

The Court found that the "primary purpose" of FECA—"to limit the actuality and appearance of corruption resulting from large individual financial contributions," *id.* at 26—was better served by the contribution restrictions than by the limits on expenditures. The Court believed that the $1,000 contribution restriction[22] "focuse[d] precisely," *id.* at 28, on the evils of political *quid pro quo* arrangements, whose actual or perceived presence threatened to under-

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[22] 2 U.S.C. § 441a(a)(1)(A).

mine the integrity of our system of representative democracy. The expenditure limitations, on the other hand, did not "serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process." *Id.* at 47-48. Limitations on a candidate's personal campaign expenditures were clearly unrelated to the elimination of *quid pro quo* arrangements. To the extent that independent expenditures, by third parties unaffiliated with the candidate, posed *quid pro quo* concerns, such expenditures would be treated as "contributions" under the Act and thus separately regulated. *Id.* at 46-47.

Because the Court found that the speech and associational interests abridged by the contribution limitations were only marginal, and that these limitations were closely tailored to the achievement of the government's strong interest in preventing *quid pro quo* arrangements, the contribution limitations were sustained. But the expenditure limitations, which implicated more substantial speech and associational interests, while furthering insubstantial government interest, were invalidated.

It is important to recognize that the Court in *Buckley* applied a single standard of review to both the expenditure and the contribution limitations, and that this standard of review demands careful analysis of asserted governmental objectives. In discussing the government interests that would be necessary to sustain the contribution limitations, despite the relatively modest impact of these restrictions on the freedoms of speech and association, the Court stated:

> In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the

> closest scrutiny." *NAACP v. Alabama, supra,* at 460-461. Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v. Letter Carriers,* 413 U.S. 548, 567 (1973). Even a "'significant interference' with protected rights of political association" may be sustained if *the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.*

Id. at 25 (emphasis supplied).

The Court's requirement that the government employ means closely tailored to the achievement of its asserted objectives is consistent with the approach taken in numerous First Amendment cases.[23] *See, e.g., Village of Schaumberg v. Citizens For a Better Environment,* 48 U.S.L.W. 4162, 4166 (1980); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 316-17 (1974) (Brennan, J., dissenting); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 99 (1972). I conclude that there are at least two reasons for this requirement. First, the transcendent importance of unfettered speech and association in sustaining a free society requires that governmental speech or associational restrictions not be excessive or overbroad. Second, when the government

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[23]While the Court's use in *Buckley* of an interest-balancing standard of review to analyze a legislative regulation of content-related harms seems difficult to square with its careful distinguishing of *United States v. O'Brien,* 391 U.S. 367 (1968), at the outset of its opinion (*see* note 21 *supra*), once the Court embarked on an interest-balancing inquiry, it adhered to the balancing analysis traditionally employed in First Amendment cases such as *O'Brien*: it questioned whether the challenged regulations were closely related to the achievement of important governmental interests.

uses restrictions which are not closely fitted to its asserted legitimate objectives, and those restrictions involve discrimination among speakers, it may appropriately be questioned whether the asserted legitimate (non-censorship) objectives were the government's actual reason for enacting the restriction. In this case, examination of the asserted purposes reveals governmental objectives that cannot withstand First Amendment scrutiny.

B

The above analysis of *Buckley* makes it clear that the $5,000 restriction on contributions to a political committee challenged herein may be sustained under the First Amendment only if (1) the government's interests outweigh the impact on group/individual speech and associational freedoms; and (2) the restriction of unincorporated associations, but not corporations or labor organizations, is closely tailored to achieve the government's asserted interests. I would hold that section 441a(a)(1)(C), particularly when read in light of section 441b(b)(2)(C), cannot survive this especially stringent standard of review.

The speech and associational interests abridged by section 441a(a)(1)(C) are more substantial than the interests affected by the contribution limitations sustained in *Buckley*. In *Buckley* the contribution limitations governed contributions from a supporter to a candidate. The communication inhering in such contributions is simply that the contributor "supports" the candidate and his views. The Court found that this "symbolic expression of support," 424 U.S. at 21, is adequately communicated by the act of contribution: the contribution's size is of

"marginal" importance. *Id.* Regulating the amount of the contribution thus involves "little direct restraint on [the contributor's] political communication." *Id.*

In contrast, section 441a(a)(1)(C) limits donations from an unincorporated association to its own political mouthpiece as well as to other committees that share its views. The object of an unincorporated association's donations to a political committee is not merely to indicate "support" for the committee's views, but to use the instrument of a political action committee to voice its own ideas. Whereas in *Buckley* "the transformation of contributions into political debate involve[d] speech by someone other than the contributor," *id.*, here this transformation is accomplished by the committee donors themselves, through a committee which, in large or small measure, they control. A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the section 441a(a)(1)(C) donation restriction to the contribution limitations upheld in *Buckley*. Section 441a(a)(1)(C) imposes "direct and substantial restraints on the quantity" of an unincorporated association's, and its members', "political speech."[24]

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[24]It is true, of course, that "persons," including unincorporated associations, remain free to make independent expenditures other than through political committees. It might be argued, therefore, that the restriction on use of the political action committee vehicle for political speech purposes is but a limitation on the *manner*, as opposed to the *extent*, of an unincorporated association's political speech. *See Buckley v. Valeo, supra,* 424 U.S. at 18 n.17. But even

Id. at 39. The individual speech interests are therefore comparable to those affected by the expenditure limitations invalidated in *Buckley.*

The impact upon associational freedoms is even more substantial. Although it is true that section 441a(a)(1)(C), like the contribution limitations in *Buckley,* permits "like-minded persons to pool their resources in furtherance of common political goals," *id.* at 22, unincorporated associations may annually donate no more than $5,000 in money or administrative support to political committees, while corporations and labor organizations may annually give such committees unlimited administrative support. Donors band together in economic support of a political committee so that the committee can compete effectively for attention in the marketplace of ideas, thereby "amplifying" the committee members' political views. *See Buckley v. Valeo, supra,* 424 U.S. at 22. Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 Yale L. J. 953, 957-61 (1977). Indeed, this "amplifying" ability of organizations and associations was "the original basis for the recognition of First Amendment protection of freedom of association." *Buckley v. Valeo, supra,* 424 U.S. at 22. Although some unincorporated associations may be

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restrictions on just the *manner* of speech must be closely tailored to the achievement of substantial governmental interests. *E.g., Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 99, 101 (1972); *see* cases cited on this issue at page 14. Thus, whether the $5,000 restriction is viewed as an *extent* restriction, or as a *manner* restriction, the government interests asserted in its support must be closely scrutinized. As I discuss, the government interests are weak and unnecessary.

capable of amplifying their political views without the aid of a political action committee, not all unincorporated associations have the political and economic clout of a large organization like CMA. On its face, section 441a(a)(1)(C) prevents even a small unincorporated association from providing unlimited support to a separate political committee. Establishment and administration of such a committee, often a costly undertaking, may be essential to attract the financial support of outside donors. Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political marketplace with other more affluent "persons" capable of huge personal expenditures. The unrestricted right to engage in a favored type of political activity—association in a political committee form—is at issue. The restriction on an unincorporated association's right to participate unrestrained in this form of political activity goes to the heart of the associational right. *See Cousins v. Wigoda,* 419 U.S. 477 (1975). I would find, therefore, that the associational interest abridged by section 441a(a)(1)(C) is on a par with the associational interests unconstitutionally infringed by the expenditure limitations in *Buckley.*[25]

In contrast to these strong individual speech and associational interests, the government interest served by section 441a(a)(1)(C) is weak. Before its passage, the only limitation on the amount that a "person," including an

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[25]Congress' use of the term "contribution" in section 441a(a) to describe its regulation of donations to political committees is of course unimportant to the issues at hand: the Court's analysis in *Buckley* makes it clear that speech and associational considerations, not semantic considerations, govern these First Amendment issues.

unincorporated association, could contribute to a political committee was the $25,000 limitation on aggregate contributions by a single "individual." *See* 2 U.S.C. § 441a(a)(3). The purposes of the $5,000 limitation in section 441a(a)(1)(C) were discussed in the conference report accompanying S. 3065.

> The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, . . . is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Rep. No. 1057, 94th Cong., 2d Sess. 56-57 (1976), *reprinted in 1976 Legislative History* at 1051-52. These asserted reasons for section 441a(a)(1)(C) are just as insubstantial as those advanced in support of the expenditure limitations in *Buckley*. The purposes set forth in the conference report all involve preventing "persons" from using supposedly independent (of candidates) political action committees to funnel hidden contributions directly to candidates. But such misuse is reached elsewhere in FECA's statutory scheme. Section 441a(a)(7)(B)(i) states that expenditures "by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,

a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Section 441a(a)(8) states that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." Together, these sections ensure that all reported contributions to candidates, whether direct or indirect, are counted against the donor's permissible contribution under section 441a(a)(1).[26] Congress thus already has implemented a method for controlling circumvention of the contribution regulations which is less intrusive upon free speech than that challenged here.

In addition to the anti-circumvention purpose set forth in the legislative history and argued to us by the FEC, the majority asserts that Congress may have wished, by enacting section 441a(a)(1)(C), to curb the generalized corruptive threat posed by committees. The majority *speculates* that Congress may have intended, by restricting "persons' " donations to political committees to $5,000, to prevent not only "funnelling" of illegal contributions through commit-

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[26]In addition, 2 U.S.C. § 441a(a)(5), the so-called "non-proliferation" provision, regulates the creation of multiple political committees subject to common control through which a "person," labor organization, or corporate entity can funnel contributions to candidates. For purposes of the section 441a(a)(1) contribution limitations, all contributions by political committees "established or financed or maintained or controlled" by the same entity (including by "persons," hence unincorporated associations are covered) are aggregated as if from a single political committee. 2 U.S.C. § 441a(a)(5).

tees to candidates, but also the accumulation of huge sums in these "vast, unaccountable, and low visibility centers of electoral influence that effectively detach candidates from their nominal geographic constituencies." See *ante*, p. .

One obvious objection to the majority's hypothesized congressional purpose for section 441a(a)(1)(C) is that this and similar statements about Congress' perception of the evils of committees are fabricated out of thin air. They find no support in the record, or in the legislative history. The 1979 study prepared at Harvard to look into the impact of FECA is no evidence of a congressional purpose in 1976, when section 441a(a)(1)(C) was enacted.

Beyond this, the majority's speculation violates the general rule that when performing strict scrutiny a court does *not hypothesize* conceivable governmental purposes in support of challenged legislation. *Johnson v. Robison*, 415 U.S. 361, 376-77 (1974). *See also, e.g., Schlesinger v. Ballard*, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting). We are limited to evaluation of the purposes actually set forth by Congress. *E.g., Johnson v. Robison, supra*, 415 U.S. at 376; *Cleveland Bd. of Educ. v. Lafleur*, 414 U.S. 632, 641 n.9 (1974). *See generally*, Gunther, Foreword: *In Search of Enduring Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). As the Supreme Court stated in *Buckley*, for example, a " 'significant interference with protected rights of political association' may be sustained if *the State demonstrates* a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of constitutional

freedoms." 424 U.S. at 25. (Emphasis supplied.) The majority's speculation about why Congress *might* have desired to regulate committees violates the rule against hypothesizing objectives.

Even if it were permissible to consider an unarticulated congressional purpose to restrict generally the growth and power of political committees, the majority commits a serious category mistake by equating Congress' supposed effectuation of this purpose in section 441a(a)(1)(C) with the anti-corruption purpose that sustained the contribution limitations in *Buckley*. It is crucial to remember that Congress enacted the $1,000 limit on a "person's" contributions to candidates in order to thwart the corruptive *quid pro quo* of a direct gift to a candidate. The $5,000 limit on a political committee's contributions to candidates in section 441a(a)(2)(A) is the equivalent restriction on a committee's *quid pro quo* arrangements with candidates. Section 441a(a)(1)(C), in contrast, regulates an entirely different relationship: that of donor ("person") to committee. The purposes behind the contribution limits approved in *Buckley* and the donation restriction in section 441a(a)(1)(C) are necessarily distinguishable because a different relationship is being regulated. The majority simply ignores these differences which distinguish our case from *Buckley*. This leads in turn to the following error. The majority finds that Congress might desire to limit the growth of committees, so that they will not corrupt politicians. But the $5,000 limit on contributions to candidates already performs this anti-corruption function. Regulating the amounts that "persons" can donate to committees simply stifles the economic growth of a certain type of political

association, a political committee, which is already subject to a $5,000 restriction on gifts to candidates.

Thus, no significant government anti-corruption objectives support the substantial infringement on speech and associational rights represented by section 441a(a)(1)(C). A "person's" contributions to its political action committee in no way implicate the *quid pro quo* concerns which supported the contribution limitations in *Buckley*. Such donations are not made to a candidate, and any contributions which the committee in turn makes to candidates are governed by the other contribution limitations set forth in section 441a. I would hold, therefore, using the method of analysis employed in *Buckley,* that no governmental interest outweighs the impact of section 441a(a)(1)(C) on group and individual speech and associational freedoms.

Furthermore, even if there were substantial anti-corruption reasons in favor of section 441a(a)(1)(C), the application of this limitation, in light of the administrative support restriction placed upon unincorporated organizations but not upon corporations and labor organizations, is not carefully tailored to achieve the government's interests. There is no reason to think that support of a political action committee by an unincorporated association poses greater dangers of corruption than such support by a corporation or labor organization. It is true that corporations and labor organizations are totally disabled from making contributions directly to candidates while unincorporated associations are not. Yet this does not make corporations and labor organizations less likely to use administrative support to circumvent the especially stringent restrictions applicable to them. The corruption poten-

tial of administrative support of a political action committee is the same, whether the corruptor is incorporated or not. The majority offers no reasons why labor organizations and corporations are unlikely to misuse political committees. There are none. In such circumstances, the application of section 441a(a)(1)(C) to unincorporated associations but not to corporations and labor organizations is unconstitutionally underinclusive.

As mentioned earlier, the use of loosely fitted means to accomplish asserted governmental objectives may imply illegitimate governmental purposes. In this case, the application of restrictions to unincorporated associations, but not to corporations and labor organizations, in no way furthers a governmental objective of preventing corruption. Indeed, the majority and the FEC argue that this disparate treatment of unincorporated associations vis-a-vis labor organizations and corporations is justified by FECA's overall regulatory scheme. Because labor organizations and corporations are totally disabled from making direct contributions while unincorporated associations are not, it is argued that Congress simply equalized the various entities' respective speech opportunities by not including unincorporated associations in the administrative support exemption. That is, Congress muffled the unincorporated association voice in fairness to the already (though differently) muffled voice of corporations and labor organizations. The First Amendment, however, does not permit Congress to restrict differentially the speech of particular persons in an effort to achieve a harmonious balance. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978); *Buckley v. Valeo, supra*, 424 U.S. at 48-49; *Bald-*

win v. Redwood City, 540 F.2d 1360, 1369-70 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo, supra*, 424 U.S. at 48-49. The statutory distinction between unincorporated associations and corporations or labor organizations is therefore not "tailored" to achievement of the government's only legitimate objectives, which are to reduce corruption and increase confidence in our electoral processes.[27]

C

I would find that the restriction in section 441a(a)(1)(C), when read in light of the administrative support exemptions for corporations and labor organizations, imposes an inadequately justified burden on the speech and associational rights of members of an unincorporated association. I would thus hold that this section of FECA is unconstitutional on its face.

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[27]This case does not present the issue of whether the absolute bar on labor and corporate contributions directly to candidates violates the First Amendment. The Supreme Court has not yet resolved this question. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978). The Court in *First National Bank* observed, without reaching the issue, that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Id.* at 788 n.26; *see* Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. Pa. L. Rev. 386, 408-10 (1977). For additional articles on this issue, see citations in Houdek and Ford, *The Federal Election Campaign Act and Its Amendments: A Selected Legal Bibliography with Annotations*, 72 Law Lib. J. 194, 207-208 (1979).

I am well aware that if my opinion were adopted, it would, until appropriate statutory modification, result in granting associations a special privilege to make unlimited donations to political committees, a privilege not extended to individual persons. I acknowledge that striking a portion of FECA would produce a consequence that is somewhat inconsistent with the remaining statutory scheme. This unwelcome and ironic result is forced upon me by the conflict between the First Amendment and Congress' drafting of the statute. That the result is distasteful to the majority does not constitute a valid reason for declining to enforce the First Amendment. Were the consequences of my reasoning to be deemed unfortunate, it would be up to the Congress to draft a statute which is both fair and in harmony with the First Amendment.

Judge Anderson concurs in Part I of this opinion. Judges Choy, Anderson, and Hug concur in Parts II and III. Judges Anderson and Hug concur in Part IV.

Appendix B

STATUTES AT ISSUE

I. 2 U.S.C. § 431(e)(5)(F), and § 431(8)(B)(vi)

II. 2 U.S.C. § 431(f)(4)(H), and § 431(9)(B)(v)

III. 2 U.S.C. § 441a(a)

IV. 2 U.S.C. § 441b(a)-(b)(2)(C)

I.

§ 431. Definitions

(e) "contribution"—

(5) does not include—

(f) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;

With the enactment of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, this provision now reads:

§ 431. Definitions

(8)(B) The term "contribution" does not include—

(vi) any payment made or obligation incurred by a corporation or a labor organization which under section 441b(b) of this title would not constitute an expenditure by such corporation or labor organization;

II.

§ 431. Definitions

(f) "expenditure"—

(4) does not include—

(H) any payment made or obligation incurred by a corporation or labor organization which, under the provisions of section 441b, would not constitute an expenditure by such corporation or labor organization;

With the enactment of The Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, 93 Stat. 1339, this provision now reads:

§ 431. Definition

(9) The term "expenditure" does not include—

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

III.

§ 441a(a)

§ 441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candi-

date, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees, which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a

political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that—

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a

Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if—

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate

to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

IV.

§ 441b(a)-(b)(2)(C)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor

disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Appendix C

United States District Court

For the Northern District of California

No. C 79 1089 WHO

California Medical Association, et al.,
Plaintiffs,

vs.

Federal Election Commission, et al.,
Defendants.

[Filed July 9, 1979]

ORDER CERTIFYING CONSTITUTIONAL QUESTIONS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DENYING MOTION TO DISMISS

This matter having come on regularly for hearing before this Court on Friday, June 29, 1979, pursuant to plaintiffs' Motion for Certification of Constitutional Questions to the United States Court of Appeals for the Ninth Circuit [2 U.S.C. § 437h], and defendants' Motion to Dismiss; the parties having appeared through counsel; and the Court having been fully advised;

THE COURT HEREBY FINDS THAT:

1. Plaintiff California Medical Association ("CMA") is a membership organization, organized and operating as a not-for-profit, unincorporated association. CMA has estab-

lished and administers a political action committee known as the California Medical Political Action Committee. CMA provides CALPAC with administrative support in the form of goods and services.

2. Plaintiff California Medical Political Action Committee ("CALPAC") is a political committee registered with the Federal Election Commission. CALPAC operates as a political committee and makes contributions to candidates for federal office. CALPAC was established and is administered by CMA and receives contributions solicited by CMA. CALPAC receives administrative support, as defined in 2 U.S.C. § 441b(b)(2)(C), from CMA in the form of goods and services.

3. Plaintiffs Sidney E. Foster, M.D., and E. Kash Rose, M.D., are eligible to vote for the office of President of the United States, and are members of CMA and CALPAC.

4. The Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. § 431 *et seq.*, and specifically § 441a(a)(1)(C), impose a $5,000 calendar year limit on contributions, as defined in § 431(e), by any person to a political committee. The Act, and specifically §§ 441a (a)(1)(C) and 441a(f), impose a $5,000 calendar year limit on the amount of contributions a political committee may receive from any person. Under these provisions the amount which CMA may contribute to CALPAC, and which CALPAC may receive from CMA, is limited to $5,000 per calendar year.

5. Under §§ 431(e)(5)(F), 431(f)(4)(H), and 441b-(b)(2)(C), corporations and labor organizations may make unlimited contributions of administrative support, as de-

fined in § 441b(b)(2)(C), to their respective political committees which operate as separate segregated funds. These provisions allow political committees, sponsored by a corporation or labor organization, which operate as a separate segregated fund, to receive unlimited contributions of administrative support as defined in § 441b(b)(2)(C), from the respective corporation or labor organization.

6. Section 441a(a)(1)(C), § 431(e)(5)(F) and § 431-(f)(4)(H), and § 441b(b)(2)(C) as it is interpreted by the Federal Election Commission, limit the amount which CMA may contribute to CALPAC as administrative support, as defined by § 441b(b)(2)(C), to $5,000 per calendar year. These provisions limit the amount of administrative support, as defined in § 441b(b)(2)(C), that CALPAC may receive from CMA to $5,000 per calendar year. This result is based solely on the fact that CMA is unincorporated and does not qualify as a "corporation" or "labor organization" as those terms are used in the Act.

7. The Federal Election Commission has determined there is probable cause to believe that CMA has violated § 441a(a)(1)(C) by making contributions of administrative support to CALPAC in excess of $5,000 per calendar year. The Commission has also determined there is probable cause to believe that CALPAC has violated § 441a(f) by receiving contributions of administrative support from CMA in excess of $5,000 per calendar year. On May 22, 1979, the Commission filed an enforcement action in the Northern District of California, *Federal Election Commission v. California Medical Association, California Medical Political Action Committee,* Docket Number C 79 1197

WHO, alleging that CMA and CALPAC had violated §§ 441a(a)(1)(C) and 441a(f), respectively, because of CMA's support of CALPAC. Plaintiffs have alleged in the present action that § 431(e)(5)(F), § 431(f)(4)(H) and §441b(b)(2)(C), on their face, and as applied to CMA and CALPAC, violate plaintiffs' rights under the First and Fifth Amendments, to the extent these provisions limit the amount of administrative support CMA may contribute to CALPAC, and which CALPAC may receive from CMA. A case or controversy exists within the meaning of Article III of the Constitution.

8. The constitutional questions presented in plaintiffs' Complaint filed May 7, 1979, are:

PLAINTIFFS' QUESTIONS:

a. Does the $5,000 calendar year limit established by 2 U.S.C. § 441a(a)(1)(C) on contributions to a political committee, when applied to contributions of administrative support as specified in § 441b(b)(C) by CMA, an unincorported association, to CALPAC, CMA's political action committee, violate the First and Fiftth Amendments to the Constitution, when these provisions, and 2 U.S.C. §§ 431(e)(5)(F) and 431(f)(4)(H), on their face and as interpreted by the Federal Election Commission, allow unlimited contributions of such administrative support by corporations and labor organizations to their respective political action committees?

b. Does the $5,000 calendar year limit established by 2 U.S.C. § 441a(a)(1)(C) on contributions to a political committee, when applied to CALPAC's receipt of contributions of administrative support as specified in § 441b(b)(2)(C) from CMA, an unincorporated association and CALPAC's connected organization as defined in 11 C.F.R. § 100.15, violate the First and Fifth Amendments to the Constitution when these provisions, and 2 U.S.C. §§ 431(e)(5)(F) and 431(f)(4)(H), on their face and as interpreted by the Federal Election Commission, allow receipt of unlimited contributions of such administrative support by political action committees sponsored by corporations and labor organizations?

DEFENDANTS' QUESTIONS:

a. Do §§ 441b(b)(2)(C), 431(e)(5)(f) and 431(f)(4)(H), which on their face exclude expenditures by corporations and labor organizations for the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for po-

litical purposes from the definitions of contributions limited by § 441a(a), but do not on their face exclude expenditures for similar purposes by CMA, an unincorporated association, from the same definitions, violate plaintiffs' rights under the First and Fifth Amendments to the United States Constitution?

b. Do §§ 441b(b)(2)(C), 431(e)(5)(f) and 431(f)-(4)(H), which on their face exclude the receipt of contributions from corporations and labor organizations by separate segregated funds for the establishment, administration and solicitation of contributions to the separate segregated funds to be utilized for political purposes from the definitions of contributions limited by § 441a(a), but do not on their face exclude the receipt of contributions from CMA, an unincorporated association, by CALPAC from the same definitions, violate plaintiff's rights under the First and Fifth Amendments to the United States Constitution?

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that the constitutional questions specified in Paragraph 8 above be, and hereby are, certified to the United States Court of Appeals for the Ninth Circuit, for hearing en banc, pursuant to 2 U.S.C. § 437h, and shall be advanced on the docket and expedited to the greatest extent possible pursuant to § 437h(c). Defendants' Motion to Dismiss is denied.

Dated: July 9, 1979

WILLIAM H. ORRICK
United States District Judge

Appendix D

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United States Court of Appeals
For the Ninth Circuit

No. 79-4426

California Medical Association, a not-for-profit unincorporated association, California Medical Political Action Committee, a political committee, Sidney E. Foster, M.D., and E. Kash Rose, M.D.,

Plaintiffs-Appellants,

vs.

Federal Election Commission, et al.,

Defendants-Appellees.

[Filed June 3, 1980]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice Is Hereby Given that California Medical Association, California Medical Political Action Committee, Sidney E. Foster, M.D., and E. Kash Rose, M.D., plain-

tiffs-appellants in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the decision filed and the judgment entered on May 23, 1980, by the United States Court of Appeals for the Ninth Circuit. Appellants appeal from that portion of the decision rejecting appellants' claims on the merits and answering each of the certified questions in the negative. This appeal is taken pursuant to 2 U.S.C. § 437h(b).

Dated: June 3, 1980

Hassard, Bonnington, Rogers & Huber

/s/ RICK C. ZIMMERMAN

Rick C. Zimmerman
44 Montgomery Street,
Suite 3500
San Francisco, California 94104

CERTIFICATE OF SERVICE BY MAIL

I, Rick C. Zimmerman, a member of the bar of the Supreme Court of the United States and one of the attorneys of record for plaintiffs-appellants herein, hereby certify that on June 3, 1980, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on each of the parties herein by depositing such copy in the United States Post Office, San Francisco, California, airmail postage prepaid, properly addressed to counsel of record for defendants-appellees, Charles N. Steele, Esq., General Counsel, Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463.

On the same date, I also deposited a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in the United States Post Office, San Francisco, California, with airmail postage prepaid, properly addressed as follows:

Federal Election Commission
Attn: The Honorable Max Freidersdorf, Chairman
1325 K Street, N.W.
Washington, D.C. 20463

The Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

Dated: June 3, 1980

RICK C. ZIMMERMAN

Rick C. Zimmerman
44 Montgomery Street,
Suite 3500
San Francisco, California 94104

No. 79-1952

In the Supreme Cour

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

Appeal From The United States Court Of Appeals For The Ninth Circuit En Banc

JOINT APPENDIX

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J. STANLEY KIMMITT

APPEAL DOCKETED JUNE 12, 1980
JURISDICTION POSTPONED OCTOBER 6, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

Appeal From The United States Court Of Appeals For The Ninth Circuit En Banc

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U.S. Supreme Court order of October 6, 1980, postponing the question of jurisdiction until hearing on the merits 32

The order and the opinion described below have been omitted from this joint appendix. They appear in the appendix to the Jurisdictional Statement on file herein:

Order Certifying Constitutional Questions to the United States Court of Appeals for the Ninth Circuit and Denying Motion to Dismiss, printed at A-82 (Appendix C).

Opinion of the Ninth Circuit Court of Appeals, filed May 23, 1980, including concurring and dissenting opinions by Judge Choy and Judge Wallace, printed at A-1 (Appendix A).

CHRONOLOGICAL LIST OF DOCKET ENTRIES

U.S. District Court for Northern District of California:

May 7, 1979—plaintiffs' Complaint for Declaratory and Injunctive Relief filed in the U.S. District Court for Northern District of California.

May 17, 1979—plaintiffs' Notice of Motion and Motion for Certification of Constitutional Questions to the United States Court of Appeals for the Ninth Circuit, Memorandum of Points and Authorities, and Affidavits of Bradley Davis and Willis W. Babb, filed.

May 21, 1979—plaintiffs' Affidavits of Sidney E. Foster, M.D., and E. Kash Rose, M.D., filed.

May 29, 1979—FEC's Notice of Motion and Motion to Dismiss with supporting Memorandum of Points and Authorities, filed.

June 4, 1979—plaintiffs' Reply to Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion to Certify, filed.

June 5, 1979—Related Case Order filed, case reassigned to Judge William H. Orrick.

July 5, 1979—Minutes of hearing of June 29, 1979, filed, showing defendants' Motion to Dismiss ordered moot and plaintiffs' Motion for Certification of Constitutional Question granted.

July 9, 1979—Order Certifying Constitutional Questions to the United States Court of Appeals for the Ninth Circuit, filed.

July 13, 1979—FEC's Answer, filed.

Ninth Circuit Court of Appeals:

July 16, 1979—case docketed and appearance of counsel entered.

August 1, 1979—Order, by Chief Judge Browning, setting oral argument and directing parties to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc, filed.

October 11, 1979—oral argument and submission of cause to Judges Ely, Wright, Trask, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, and Tang.

May 23, 1980—Opinion by Judge Kennedy, concurring and dissenting opinions by Judge Choy and Judge Wallace, filed.

June 3, 1980—Notice of Appeal to the Supreme Court of the United States, filed.

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United States District Court
for the Northern District of California

Civil Action No. C 79 1089 CFP
Miscellaneous—Federal Election Campaign Act

California Medical Association, a not-for-profit unincorporated association, California Medical Political Action Committee, a political committee, Sidney E. Foster, M.D. and E. Kash Rose, M.D.,

Plaintiffs,

vs.

Federal Election Commission, Honorable Joan D. Aikens, Chairman, Honorable Robert O. Tiernan, Vice-Chairman, Honorable Thomas E. Harris, Commissioner, Honorable John McGarry, Commissioner, Honorable Vernon W. Thompson, Commissioner, Honorable Max Freidersdorf, Commissioner, Honorable J. Stanley Kimmit, Secretary, United States Senate, and Ex-Officio Member of the Federal Election Commission, Honorable Edmund L. Henshaw, Jr., Clerk, House of Representatives and Ex-Officio Member of the Federal Election Commission,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed May 7, 1979]

Plaintiffs, California Medical Association, California Medical Political Action Committee, Sidney E. Foster, M.D., and E. Kash Rose, M.D., for their complaint against defendants allege:

JURISDICTION

1. This action seeks a judgment declaring that certain provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), 2 U.S.C. §§ 431 *et seq.*, both on their face and as applied to plaintiffs, constitute an unconstitutional abridgement of plaintiffs' rights, and the rights of their members, to freedom of speech and association, and their rights to due process of law in violation of the First and Fifth Amendments to the Constitution of the United States.

2. This action also seeks a permanent injunction, restraining enforcement of the offending provisions of the Act.

3. Plaintiffs have been and will continue to be irreparably and immediately harmed by the offending provisions of the Act, and a case and controversy exists between the parties within the meaning of Article III of the Constitution of the United States.

4. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 2201 and 2202, and 2 U.S.C. § 437h.

5. Plaintiffs respectfully request expedited consideration of the questions presented, and expedited certification of those questions to the United States Court of Appeals for the Ninth Judicial Circuit (*En Banc*), pursuant to 2 U.S.C. § 437h.

PLAINTIFFS

6. Plaintiff California Medical Association ("CMA") is a not-for-profit unincorporated association, exempt from the payment of Federal income taxes pursuant to 26 U.S.C. § 501(a), and § 501(c) (6). CMA has its headquarters in San Francisco, California. CMA is a membership organization as that term is used in the Act. The membership consists of more than 25,000 California physicians and includes the majority of physicians engaged in the private practice of medicine in California. Members of CMA have voluntarily associated together in the CMA to promote the science and art of medicine, the protection of the public health, and the betterment of the medical profession. To accomplish these purposes, CMA acts to advance and promote its views, and the views of its members, before the legislative, executive and judicial branches of the Federal Government. In addition, CMA provides a forum for the consideration of topics with significant implications for its members and other medical practitioners, and for the public health in general. To help advance and achieve these goals, CMA has established and administers a political action committee—the California Medical Political Action Committee—which engages in political education and makes contributions to candidates for State and Federal office.

7. Plaintiff California Medical Political Action Committee ("CALPAC") is a duly constituted, unincorporated association, which operates as a nonpartisan political action committee. CALPAC has its headquarters in San Francisco, California. CALPAC is a "political committee" as defined by 2 U.S.C. § 431(d) and is registered with the Federal Election Commission in accordance with § 433.

CALPAC qualifies as a "multicandidate political committee," as defined by § 441a (a) (4). CALPAC was established and is administered by CMA. For purposes of the Act, CMA is a "connected organization" for CALPAC, as defined by § 433(b) (2) and 11 C.F.R. § 100.15. CALPAC is CMA's "separate segregated fund" as that term is used in § 441b(b) (2) (C) and 11 C.F.R. § 114.7.

8. CALPAC was organized and operates to promote the improvement of government by encouraging and stimulating physicians and others to take a more active and effective part in governmental affairs; to encourage physicians and others to know and understand the nature and actions of government, political issues and the records of officeholders and candidates; and, to assist physicians and others in organizing for effective political action and to carry out their civic responsibilities. As part of this process CALPAC supports candidates for public office whose views are consistent with and sympathetic to the views of its members. These activities are protected by the First Amendment guarantees of freedom of speech and freedom of association.

9. To advance these goals, contributions to CALPAC are solicited on a nonpartisan basis. The activities of plaintiffs in soliciting contributions to CALPAC include the dissemination of ideas, opinions and political information about matters of vital concern to physicians. The process of soliciting contributions involves the discussion of political, social and economic ideas that have important implications for physicians and the public health. The solicitation of contributions is protected by the First

Amendment guarantees of freedom of speech and freedom of association.

10. Contributions received by CALPAC are, in turn, contributed by CALPAC to candidates for public office, both State and Federal. The process of making contributions to candidates involves the evaluation of candidates, meeting with candidates, and the discussion of issues of interest to plaintiffs, and their members. The process of making contributions is protected by the First Amendment guarantees of freedom of speech and freedom of association.

11. The funds realized from plaintiffs' solicitation activities constitute virtually the only source of revenue for CALPAC. The extent to which CALPAC is able to contribute to candidates for Federal office, and to otherwise engage in protected First Amendment activity, is directly related to the ability to solicit contributions to CALPAC and, correspondingly, CALPAC's ability to use those funds to make contributions. In order to enhance CALPAC's ability to make contributions to Federal candidates and otherwise participate in the political process, CMA traditionally has provided organizational and administrative support for CALPAC. As a result, funds contributed to CALPAC are used primarily as contributions to, or on behalf of, candidates. This mechanism is typical of arrangements between corporations, labor organizations, and other entities, and their sponsored political action committees—known as "separate segregated funds" in the parlance of the Act. In essence, this arrangement allows funds received as contributions from interested persons to be used for direct candidate support, with administrative expenses being funded by another source.

12. Plaintiff Sidney E. Foster, M.D., is a member of CMA and CALPAC. He resides in San Francisco, California, and is eligible to vote for the Office of President of the United States. Dr. Foster serves as Treasurer of CALPAC and is active in CALPAC's political activities.

13. Plaintiff E. Kash Rose, M.D., is a member of CMA and CALPAC. He resides in Napa, California, and is eligible to vote for the Office of President of the United States. Dr. Rose has served as an officer of CMA and CALPAC and continues to be active in matters concerning CMA's support of CALPAC, and the political activities of CALPAC.

14. Plaintiffs are continuing to engage in the exercise of protected First Amendment rights of freedom of speech and association through, *inter alia,* CALPAC's contributions to candidates for Federal office. In providing administrative support for CALPAC, CMA fulfills the intent of contributors by allowing the entire amount contributed to be used for making contributions. CALPAC's ability to contribute to Federal candidates is directly related to CALPAC's ability to use the contributions received to make contributions, and to receive administrative support from CMA.

DEFENDANTS

15. Defendant Federal Election Commission ("the Commission") was established pursuant to 2 U.S.C. § 437c by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263. The Commission administers the Act, obtains compliance with its provisions, and formulates

policy with respect to the Act, and Chapters 95 and 96 of the Internal Revenue Code, pursuant to § 437d.

16. Defendant Joan D. Aikens is the Chairman of the Commission. This case is brought against Ms. Aikens solely in her official capacity as a member of the Commission.

17. Defendant Robert O. Tiernan is the Vice-Chairman of the Commission. This case is brought against Mr. Tiernan solely in his official capacity as a member of the Commission.

18. Defendants Max Freidersdorf, John McGarry, Vernon W. Thompson, and Thomas E. Harris are Commissioners and members of the Commission. This case is brought against them solely in their official capacities as members of the Commission.

19. Defendant J. Stanley Kimmit is the duly appointed Secretary of the United States Senate and is, pursuant to the Act, an ex-officio member of the Commission. This case is brought against Mr. Kimmit solely in his official capacity as a member of the Commission.

20. Defendant Edmund L. Henshaw, Jr., is the Clerk of the United States House of Representatives and is, pursuant to the Act, an ex-officio member of the Commission. This case is brought against Mr. Henshaw solely in his official capacity as a member of the Commission.

THE FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED

21. The Act, 2 U.S.C. § 431 *et seq.*, establishes limitations on contributions. No person may contribute more than $1,000 to a candidate for Federal office with respect to an

election, pursuant to § 441(a) (1) (A). No multicandidate political committee may contribute more than $5,000 to a candidate for Federal office with respect to an election, pursuant to § 441a(a) (2) (A). Significantly, contributions to a political committee are limited to $5,000 in a calendar year. Section 441a(a) (1) (C) provides that no person shall make contributions:

> to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

22. For purposes of the Act, the term "contribution" includes monetary contributions, and contributions of goods and services—sometimes referred to as in-kind contributions. Section 431(e) states, in pertinent part:

> (e) "contribution"—
>
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value made *for the purpose of*—
>
> (A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates . . .;
>
> (B) influencing the results of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;
>
> (4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another which are rendered to such candidate or political committee without charge for *any such purpose*, . . . (Emphasis added.)

Under Section 431(e), and the pertinent regulation, 11 C.F.R. §100.4, monetary contributions and contributions of goods and services, made to a political committee for the purpose of influencing a Federal election, are considered as "contributions" under the Act. Under the current interpretation of these provisions, when CMA provides administrative support for CALPAC by paying administrative expenses or otherwise providing goods and services it is making a contribution to CALPAC, to the extent the money, goods or services are for the purposes of influencing a Federal election.

23. The Commission's regulations, 11 C.F.R. § 102.6, permit political committees to contribute to both Federal and non-Federal candidates. Pursuant to 11 C.F.R. § 106.1(e) administrative expenses must be allocated in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis.

24. Pursuant to § 441b(a), corporations and labor organizations are prohibited from making contributions or expenditures in connection with Federal elections. However, § 441b(b) (2) excludes certain activities from the definition of contribution or expenditure, including administrative support for a political action committee. For example, § 441b(b) (2) (C) provides that the term "contribution or expenditure" shall not include:

> the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Similarly, § 431(e) (5) (F) states that the term "contribution" does not include:

> any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of § 441b would not constitute an expenditure by such corporation or labor organization;

Similarly, § 431(f)(4)(H) provides that the definition of "expenditure" does not include:

> Any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of § 441b, would not constitute an expenditure by such corporation or labor organization;

Thus, by definition certain payments made to support a political action committee are excepted from the definition of "contributions."

25. Pursuant to §§ 441b(b) (2) (C), 431(e) (5) (F) and 431(f)(4)(H), corporations and labor organizations may make *unlimited* contributions and expenditures for the establishment and administration of, and the solicitation of contributions to, a separate segregated fund to be used for political purposes. Under these provisions corporation or labor organizations may provide *unlimited* amounts as administrative support for their sponsored political action committees.

26. The Act provides, in §§ 437g(a)(5)(C), 437g(a) (7) and 441j, civil and criminal penalties for violations of the contribution limitations established by § 441a. Pursuant to § 441a(f), no political committee may knowingly accept a contribution in violation of § 441a.

27. The reference in § 441b(b)(2)(C) to membership organizations allows unlimited contributions of administrative support by a membership organization, either incorporated or unincorporated, to its political action committee. Nevertheless, the Commission has interpreted the Act to limit contributions by an unincorporated membership organization to its separate segregated fund—or political action committee—to $5,000 per calendar year.

28. Under the Commission's interpretation payments by an unincorporated membership organization in support of its political action committee are limited to $5,000 per year, while corporations and labor organizations may provide unlimited administrative support for their political action committees. With this interpretation, payments by CMA to or on behalf of CALPAC, made for the purpose of establishing, administering and soliciting contributions to CALPAC, are limited to $5,000 per calendar year. There is no similar limitation on corporations, labor organizations, or even on membership organizations that are incorporated. It is evident the application of a $5,000 calendar year limitation is based solely on the fact that CMA is an *unincorporated* membership organization.

29. The ability of plaintiffs to engage in effective political activity, and specifically the effective participation by CALPAC in Federal campaigns, is dependent on the ability of CMA and CALPAC to solicit contributions for CALPAC, and in turn, CALPAC's ability to use funds received as voluntary contributions to make contributions to candidates for Federal office. To the extent voluntary contributions received by CALPAC are used to defer administrative expenses, rather than being contributed to

candidates for Federal office, CALPAC's ability to participate in Federal elections is curtailed. If CMA's administrative support of CALPAC allocable to Federal activities is limited to $5,000 per calendar year, CALPAC will be required to use a portion of the voluntary contributions it receives, which are intended for use as contributions to candidates for public office, to cover administrative expenses. Alternatively, CALPAC will be forced to limit its activity with respect to Federal elections to conform to an administrative support budget of $5,000 per calendar year.

30. In contrast, political action committees sponsored by a corporation or a labor organization, which operate as a separate segregated fund as that term is used in § 441b(b)(2)(C), are able to use all funds received as contributions to make contributions to, or expenditures on behalf of, candidates for Federal office. The costs of establishing the political action committee, administrative expenses incurred by the committee and costs of soliciting contributions to the committee may be provided in full, without any limitation, by the sponsoring corporation or labor organization. By comparisn, CMA is limited in its sponsorship of CALPAC to $5,000 per calendar year for Federal activities. The net effect of this limitation is to curtail Federal election activities by CALPAC. In relative terms this enhances the effectiveness of political action committees established and administered by corporations or labor organizations. This interpretation imposes a substantial restraint on the ability of CMA to provide administrative support to CALPAC, and on the ability of CALPAC to participate in Federal campaigns.

31. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face and as interpreted and applied by the Commission, are an unconstitutional abridgement of the plantiffs' rights of freedom of speech and association to the extent they have been, or may be, interpreted to impose a $5,000 calendar year limitation on CMA's administrative support for CALPAC, because these provisions abridge:

a. the ability of plaintiffs to communicate political ideas, opinions, and information;

b. the ability of plaintiffs to solicit contributions for use in Federal campaigns;

c. the ability of plaintiffs, and their members, to associate with each other, and with other concerned individuals, for the purpose of participating in Federal elections;

d. CMA's ability to absorb the costs of establishing and administering a political action committee which is active in Federal campaigns;

e. CALPAC's ability to receive administrative support and make contributions to candidates for Federal office;

f. plaintiffs' ability to compete on equal terms with corporations and labor organizations which establish or administer political action committees that are active in Federal campaigns.

32. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face, and as interpreted by the Commission, arbitrarily, capriciously, and invidiously discriminate against CMA and its members in

violation of their rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution of the United States, in that these provisions limit the amount which CMA may contribute as administrative support of CALPAC to $5,000 per calendar year, whereas corporations and labor organizations which establish and administer a political action committee are not subject to any such limitation.

33. Section 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C), on their face and as interpreted by the Commission, arbitrarily, capriciously, and invidiously discriminate against CALPAC and its members in violation of their rights to due process of law and equal protection of law under the Fifth Amendment to the Constitution of the United States, in that these provisions subject CALPAC to a $5,000 calendar year limitation on amounts which may be received as administrative support from CMA. The effect of this limitation is to require CALPAC to curtail its Federal activities, or to use voluntary contributions it receives to cover administrative expenses rather than as contributions to candidates. In contrast, the political action committees established and administered by corporations—including incorporated membership organizations—and labor organizations may receive unlimited support from the sponsoring corporation or labor organization.

34. The harm caused by the Commission's interpretation of §§ 441b(b)(2)(C), 431(e)(5)(F), 431(f)(4)(H) and 441a(a)(1)(C), as applied to CMA and CALPAC, is actual and not speculative or hypothetical. Fearing the imposition

of both civil and criminal sanctions provided by the Act, CALPAC has limited its activity in Federal elections since first learning of the Commission's interpretation. Plaintiffs desire to continue to participate vigorously in Federal election activities, but have curtailed these activities because of the Commission's interpretation of the sections in question and plaintiffs' apprehension that CMA and CALPAC may be subject to civil and criminal sanctions. Indeed, plaintiffs have been advised that in April, 1979 the Commission, pursuant to § 437g(a)(5)(B), found probable cause to believe CMA and CALPAC may have violated §§ 441a(a)(1)(C) and 441a(f), respectively, because of CMA's administrative support of CALPAC. A finding of probable cause may lead to an enforcement action pursuant to § 437g(a)(5)(B).

Wherefore, plaintiffs respectfully request that this complaint be immediately certified to the Court of Appeals for the Ninth Judicial Circuit, for determination by the Court *En Banc,* pursuant to 2 U.S.C. § 437h, and that a judgment be entered:

1. Declaring 2 U.S.C. § 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C) unconstitutional in violation of the First Amendment to the Constitution of the United States, to the extent these provisions on their face, or as interpreted and applied by the Commission, limit the amount which CMA may contribute as administrative support to CALPAC, and the amount CALPAC may receive from CMA as administrative support, to $5,000 per calendar year;

2. Declaring 2 U.S.C. § 441b(b)(2)(C), § 431(e)(5)(F), § 431(f)(4)(H) and § 441a(a)(1)(C) unconstitutional in violation of the Fifth Amendment to the Constitution of the United States, to the extent that these provisions on their face, or as interpreted and applied by the Commission, limit the amount which CMA may contribute as administrative support to CALPAC, and the amount CALPAC may receive from CMA as administrative support, to $5,000 per calendar year;

3. Permanently enjoining defendants from enforcing the provisions of 2 U.S.C. § 441a(a)(1)(C) as to CMA for providing administrative support mentioned in § 441b(b)(2)(C) to CALPAC in excess of $5,000 per calendar year;

4. Permanently enjoining the enforcement of 2 U.S.C. § 441a(f) against CALPAC insofar as CALPAC is alleged to have received contributions of administrative support from CMA in excess of $5,000 per calendar year.

Dated: May 7, 1979

Respectfully submitted,

HASSARD, BONNINGTON, ROGERS & HUBER

By: /s/ Rick C. Zimmerman
Attorneys for Plaintiffs

United States District Court
For the Northern District of California

RELATED CASE ORDER

[Filed June 5, 1979]

A notice of related cases has been filed suggesting that the following cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1.

C-79-1197-ACW—Federal Election Commission v. California Medical Association and California Medical Political Action Committee

C-79-1089-CFP—California Medical Association et al. v. Federal Election Commission

M-77-306-C(WHO)—Federal Election Commission v. California Medical Political Action Committee

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are not related.

United States District Judge

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are related within the meaning of Local Rule 205-2 or Local Rules 320-1.

/s/ Wm. H. Orrick
United States District Judge

Order

It appearing to the Assignment Committee that these cases are related within the meaning of Local Rule 205-2 or Local Rule 320-1, IT IS ORDERED that all of such cases

are reassigned to the Honorable William H. Orrick. Counsel are instructed that all future filings shall bear the initials WHO immediately after the case number. All matters presently scheduled for hearing are vacated and should be re-noticed for hearing before the judge to whom the case has been reassigned.

Dated: 5 Jun 1979

For the assignment committee:

/s/ Robt. Ruth
Chief Judge

New Case Clerk:

Copies to: Courtroom Deputies
Special Projects
Reassignment Log Noted WHO
ACW Ballot Replaced in Category #15
CFP Ballot Replaced in Category #13

Case System Administrator:

Copies to: All Counsel
Transferor CSA Log Book Noted

Rel Case 2 Rev 9-78

William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143
Counsel for all named defendants

United States District Court
for the Northern District of California

Civil Action No. C-79-1089-WHO

California Medical Association, et al.,
Plaintiffs,

vs.

Federal Election Commission, et al.,
Defendants.

ANSWER

[Filed July 13, 1979]

Defendants Federal Election Commission (hereinafter "the Commission") *et al.* answer the numbered paragraphs of the complaint as follows:

1. Defendants deny that part of paragraph 1 which alleges that plaintiffs have pleaded that certain provisions of the Federal Election Campaign Act of 1971, as amended, are unconstitutional on their face and admit the balance of the allegations in paragraph 1.

2. Defendants admit that part of paragraph 2 which alleges that this action seeks a permanent injunction re-

straining enforcement of provisions of the Act, but deny that any of these provisions offend the Constitution of the United States.

3. Defendants deny the allegations in paragraph 3.

4. Defendants deny the allegations in paragraph 4.

5. Defendants admit the allegation in paragraph 5, but aver that the review procedures of 2 U.S.C. § 437h are not available here.

6. Defendants admit those parts of paragraph 6 which allege that plaintiff California Medical Association (hereinafter "CMA") is a not-for-profit unincorporated association, that CMA has its headquarters in San Francisco, California, that its membership consists of more than 25,000 California physicians and includes the majority of physicians engaged in the private practice of medicine in California, and that CMA organized and administers a political committee, the California Medical Political Action Committee (hereinafter "CALPAC"), which makes contributions to candidates for State and Federal office. Defendants deny that CMA is a membership organization within the meaning of 2 U.S.C. § 441b(b)(2)(C) and (4)(C) which concern only incorporated membership organizations. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 6.

7. Defendants admit those parts of paragraph 7 which allege that plaintiff CALPAC is an unincorporated association which operates as a nonpartisan political committee, that CALPAC has its headquarters in San Francisco, Cali-

fornia, that CALPAC is a "political committee" as defined by 2 U.S.C. § 431(d) and is registered with the Commission, that CALPAC qualifies as a "multicandidate political committee" as defined by 2 U.S.C. § 441a(a)(4), that CALPAC was organized and is administered by CMA, and that CMA is CALPAC's "connected organization" as defied by 2 U.S.C. § 433(b)(2) and 11 C.F.R. § 100.15. Defendants deny that CALPAC is CMA's "separate segregated fund" as that term is used in 2 U.S.C. § 441b(b)(2)(C) and 11 C.F.R. § 114.7 and aver that the term "separate segregated fund" refers to a fund utilized for political purposes by incorporated organizations or labor organizations only.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 8 and 9.

9. Defendants admit that part of paragraph 10 which alleges that contributions received by CALPAC, are in turn, contributed to candidates for public office, both State and Federal. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 10.

10. Defendants admit those parts of paragraph 11 which allege that CMA traditionally has provided organizational and administrative support for CALPAC and that funds contributed to CALPAC are used primarily as contributions to, or on behalf of, candidates. Defendants deny that entities other than corporations or labor organizations have "separate segregated funds" within the meaning of the Federal Election Campaign Act of 1971, as amended.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 11.

11. Defendants admit those parts of paragraphs 12 and 13 which allege that plaintiff Sidney E. Foster serves as Treasurer of CALPAC and that plaintiff E. Kash Rose has served as an officer of CMA and CALPAC. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraphs 12 and 13.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

13. Defendants admit the allegations in paragraph 15.

14. Defendants admit that part of paragraph 16 which alleges that at the time of the filing of the complaint Joan D. Aikens was Chairman of the Commission and aver that since that time Robert O. Tiernan has succeeded her in that post and that Joan D. Aikens remains a member of the Commission. Defendants admit that this case is brought against her solely in her official capacity.

15. Defendants admit that part of paragraph 17 which alleges that at the time of the filing of the complaint Robert O. Tiernan was the Vice-Chairman of the Commission and aver that since that time Max Freidersdorf has succeeded him in that post and that Robert O. Tiernan remains a member of the Commission. Defendants admit that this case is brought against him solely in his official capacity.

16. Defendants admit the allegations in paragraphs 18 through 20.

17. Defendants admit the allegations in paragraphs 21 through 22.

18. Defendants admit that part of paragraph 23 which alleges that political committees may as a general rule contribute to both Federal and non-Federal candidates and aver that 11 C.F.R. § 102.6 regulates the manner in which such committees must operate. Defendants admit the balance of the allegations in paragraph 23.

19. Defendants admit that part of paragraph 24 which alleges that 2 U.S.C. § 441b(a) prohibits corporations and labor organizations from making contributions or expenditures in connection with Federal elections and admit that the language of 2 U.S.C. §§ 441b(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H) is as quoted in paragraph 24. Defendants deny that 2 U.S.C. §§ 441b(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H) exclude administrative support of any and all political action committees from the definition of contribution or expenditure and aver that those provisions exclude from the term "contribution or expenditure" in § 441b(a), the definition of "contribution" in § 431(e), and the definition of "expenditure" in § 431(f) the administrative support given only by a corporation or labor organization to its separate segregated fund.

20. Defendants admit that part of paragraph 25 which alleges that, pursuant to 2 U.S.C. §§ 441(b)(b)(2)(C) and 431(e)(5)(F) and (f)(4)(H), a corporation or a labor organization may make unlimited contributions or expendi-

tures for the establishment and administration of, and the solicitation of contributions to, a separate segregated fund to be used for political purposes and aver that under these provisions a corporation or a labor organization may provide unlimited amounts as administrative support for its separate segregated fund. Defendants deny that a corporation or labor organization may provide unlimited amounts as administrative support for any and all "sponsored political action committees," a term not defined in the Act or regulations.

21. Defendants admit the allegations in paragraph 26.

22. Defendants deny the allegation in paragraph 27 that the reference in 2 U.S.C. § 441b(b)(2)(C) to membership organizations allows unlimited contributions of administrative support by an unincorporated membership organization to any political committee and aver that § 441b(b)(2)(C) is no more than an exemption from the prohibition of contributions or expenditures by corporations and labor organizations set forth in 2 U.S.C. § 441b(a). Defendants admit that the Commission has interpreted the Act to limit contributions by an unincorporated membership organization as specified in 2 U.S.C. § 441a(a)(1) and aver that the face of the statute compels this result.

23. Defendants admit the allegations in paragraph 28 and aver that the face of the statute compels this result.

24. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29.

25. Defendants admit those parts of paragraph 30 which allege that CMA is limited in its sponsorship of

CALPAC to $5,000 per calendar year for Federal activities and that corporations and labor organizations are not so limited with respect to their separate segregated funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 30.

26. Defendants deny the allegations in paragraphs 31 and 32.

27. Defendants admit those parts of paragraph 33 which allege that 2 U.S.C. §§ 441b(b)(2)(C), 431(e)(5)(F) and (f)(4)(H), and 441a(a)(1)(C) subject CALPAC to a $5,000 calendar year limitation on amounts which may be received as administrative support from CMA and that the separate segregated funds established and administered by corporations—including incorporated membership organizations—and labor organizations may receive unlimited support from the sponsoring corporation or labor organization. Defendants are without knowledge or information sufficient to form a belief as to effect of this limitation on CALPAC. Defendants deny the balance of the allegations in paragraph 33.

28. Defendants admit those parts of paragraph 34 which allege that plaintiffs CMA and CALPAC have been advised that in April, 1979 the Commission, pursuant to 2 U.S.C. § 437(g)(a)(5)(B), found probable cause to believe CMA and CALPAC may have violated 2 U.S.C. § 441(a)(1)(C) and (f), respectively, because of CMA's administrative support of CALPAC and that a finding of probable cause may lead to an enforcement action pursuant to 2

U.S.C. § 437g(a)(B). Defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in paragraph 34.

Defendants aver as an affirmative defense that this court lcks subject matter jurisdiction over the complaint and reassert the arguments set forth in their Motion to Dismiss.

Respectfully submitted,

/s/ William C. Oldaker
William C. Oldaker
General Counsel

/s/ David S. Branch
David S. Branch
Assistant General Counsel

/s/ Scott E. Thomas
Scott E. Thomas
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No. 79-4426

United States Court of Appeals
for the Ninth Circuit

California Medical Association, et al.,
Plaintiffs-Appellants,

vs.

Federal Election Commission, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, Circuit Judge.

ORDER

[Filed Aug. 1, 1979]

The court will hear oral argument in this case on Thursday, October 11, 1979 at 2:30 p.m. in San Francisco, California.

In addition to the questions certified by the United States District Court for the Northern District of California, in its order of July 9, 1979, the parties are requested to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Appellant will make suitable arrangements for furnishing this court with sixteen (16) copies of the trial court record.

The certificate of record is ordered filed as of August 1, 1979.

Appellant's opening brief is to be filed by August 22, 1979.

Appellee's brief is to be filed by September 12, 1979.

Appellant's reply brief, if any, is to be filed by September 19, 1979.

/s/ James Browning
United States Circuit Judge
Chief Judge

Supreme Court of the United States

No. 79-1952

California Medical Association, et al.,
Appellants,

v.

Federal Election Commission, et al.

Appeal from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 6, 1980

Supreme Court, U. S.
FILED
AUG 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit *En Banc*

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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August 26, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Whether appellants have no right to appeal a decision of the United States Court of Appeals for the Ninth Circuit rendered *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

Whether appellants may not use the extraordinary judicial review mechanism of 2 U.S.C. §437h to circumvent a pending administrative enforcement proceeding subject to judicial review under the separate procedure of 2 U.S.C. §437g.

Whether, if an appeal does lie, this Court should summarily affirm the *en banc* decision of the court of appeals, rendered after full consideration of the issues, that 2 U.S.C. §§441a(a)(1)(C), 431(8)(B)(vi),* and 441b(b)(2)(C) are consistent with the first and fifth amendments to the Constitution of the United States.

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* *See* note 2, *infra.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1952

CALIFORNIA MEDICAL ASSOCIATION, ET AL., *Appellants,*

v.

FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

On Appeal From The United States Court Of Appeals For The Ninth Circuit *En Banc*

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

Appellee Federal Election Commission ("The Commission" or "FEC") moves to dismiss this appeal because appellants may not invoke the appellate jurisdiction of this Court where the United States Court of Appeals for the Ninth Circuit specifically declined to consider this case and render its decision *en banc* pursuant to 2 U.S.C. §437h[1] and where appellants are defendants

[1] This provision is §310 of the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The relevant provisions of the Act are codified in Title 2, *United States Code*. Because of the recent amendments to the statute, citations herein will be to the *United States Code* sections as they appear in *United States Code Annotated* (West Cum. Ann. Pocket Part 1980), unless otherwise indicated.

in a Commission enforcement proceeding presently pending under 2 U.S.C. §437g which will be subject to judicial review in the court of appeals and by petition for writ of certiorari to this Court in the ordinary course of appellate procedure. Treating appellants' Jurisdictional Statement as a petition for writ of certiorari, the petition should be denied. In the alternative, should the Court find that an appeal does lie pursuant to 2 U.S.C. §437h, it should affirm the decision below because the questions presented were correctly decided and any remaining questions are so unsubstantial as not to need further argument.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit on May 23, 1980, answered questions certified to it by the United States District Court for the Northern District of California. The decision of the court of appeals and the district court order which certified the constitutional questions are printed as Appendix A and Appendix C to appellants' Jurisdictional Statement. The decision of the court of appeals is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127 (1980).

JURISDICTION

Appellants assert jurisdiction pursuant to 28 U.S.C. §§1331, 2201 and 2202 and pursuant to FECA's unique jurisdictional provision, 2 U.S.C. §437h.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 *et seq.* Specifically at issue in this appeal are 2

U.S.C. §§437h and 437g with regard to the jurisdiction of this Court, and 2 U.S.C. §§441a(a)(1)(C), 431(8)(B)(vi),[2] and 441b with regard to the merits of the decision below. For the Court's convenience, these provisions are set forth in Appendix A to this motion.

STATEMENT OF THE CASE

This action arose from an enforcement proceeding before the Federal Election Commission initiated on October 4, 1978, when the Commission, pursuant to 2 U.S.C. §437g(a)(2), found "reason to believe" that the California Medical Association ("CMA"), an unincorporated association, had violated the $5,000 contribution limit of 2 U.S.C. §441a (a)(1)(C) by contributing in excess of $5,000 per calendar year to the California Medical Political Action Committee ("CALPAC"), a multicandidate political committee.[3] After the Commis-

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[2] Section 431(8)(B)(vi) is the recodification of former 2 U.S.C. §431(e)(5)(F) pursuant to Sec. 101 of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 at 1341. The court of appeals' decision used the former citation, §431(e)(5)(F).

[3] Under 2 U.S.C. §441a(a)(1), a "person" (defined at 2 U.S.C. §431(11) to include an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons) may contribute $1,000 per election to a federal candidate or his or her authorized political committees, $20,000 per calendar year to the political committees of the national parties, and $5,000 per calendar year to any other political committee. A "multicandidate political committee" (defined at 2 U.S.C. §441a(a)(4) as a political committee which has registered for six months, received contributions from more than fifty persons, and contributed to five or more federal candidates) may contribute $5,000 to a candidate or his or her authorized political committees, $15,000 to the political committees of the national parties, and $5,000 to any other political committee. Individuals are limited to contributing $25,000 overall in any calendar year under 2 U.S.C. §441a(a)(3). Political parties are entitled to spend additional amounts on behalf of federal candidates under 2 U.S.C. §441a(d). (cont.)

sion found "probable cause to believe" that CMA had violated the statute and authorized its staff to file a civil enforcement action, CMA and CALPAC brought this suit in the United States District Court for the Northern District of California challenging the statutory provisions sought to be enforced against them. The Commission filed its enforcement action in the same district court fifteen days later. *Federal Election Commission* v. *California Medical Association,* No. C-79-1197-WHO (N.D. Cal., filed May 22, 1979)(awaiting trial decision).

Denying the Commission's motion to dismiss CMA's action for lack of subject matter jurisdiction, the district court certified four constitutional questions to the United States Court of Appeals for the Ninth Circuit "for hearing *en banc,* pursuant to 2 U.S.C. §437h." Appellants' Jurisdictional Statement, Appendix

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Corporations and labor organizations are flatly prohibited from making any contribution or expenditure in connection with any federal election under 2 U.S.C. §441b(a). The only exceptions to this proscription allow corporations and labor organizations to pay for communications and certain non-partisan activities directed at specified classes and to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund. 2 U.S.C. §441b(b)(2).

The term "contribution" as used in the contribution limitations of 2 U.S.C. §441a is defined at 2 U.S.C. §431(8) to include "any gift subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." Exempted from this definition and hence from the contribution limitations is "any payment made or obligation incurred by a corporation or a labor organization which, under §441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." 2 U.S.C. §431(8)(B)(vi). Thus, payments by an unincorporated association for the administration and solicitation expenses of a political committee are contributions subject to 2 U.S.C. §441a(a)(1)(C).

C ("J.S. App. _____"). The court of appeals *en banc* issued a decision on the certified questions on May 23, 1980. J.S. App. A. The court stated:

> We hear the appeal en banc pursuant to Fed. R. App. P. 35. Standing and jurisdiction are conferred by, *inter alia,* 2 U.S.C. §437h(a)(1976). *See Buckley* v. *Valeo,* 424 U.S. 1, 8-12 (1976)(per curiam).

Id. at A-3. However, after posing the question of §437h's constitutionality and of the potentially "severe and disruptive" effect of §437h on the court's calendar, the court of appeals concluded:

> Delicate questions such as those here suggested are to be decided only when necessary. We think the better course is to let our decision to hear the case en banc rest on our authority under Fed. R. App. P. 35. *See Buckley* v. *Valeo,* 519 F.2d 821, 902 n.2 (D.C. Cir. 1975)(per curiam)(en banc), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976) (per curiam).

J.S. App. A at A-26.

ARGUMENT

I. No Right Of Appeal Lies To This Court From An *En Banc* Decision Of A United States Court Of Appeals Rendered Pursuant To Rule 35 Of The Federal Rules Of Appellate Procedure.

The court of appeals expressly stated that it was hearing this case *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure. J.S. App. A at A-3, A-26. The court clearly decided that §437h did not require that it "hear the matter sitting en banc." By so deciding, the court rejected 2 U.S.C. §437h as the jurisdictional basis for its *en banc* disposition of the questions before it. Because the court of appeals' decision was not rendered under §437h, CMA and CALPAC have no right of appeal to this Court under that provision.[4]

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the initial case heard pursuant to the extraordinary review procedure of §437h, although the court of appeals cited

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[4] As is argued in Part II, *infra*, appellants' proper avenue of judicial review is pursuant to 2 U.S.C. §437g. The general jurisdictional statutes of Title 28, *United States Code*, such as §1331, are not available to appellants. Where Congress has provided specific judicial review mechanisms within a comprehensive regulatory scheme, litigants may not bypass such provisions and ground jurisdiction upon the general statutes of Title 28. *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411, 419-422 (1965); *Grutka* v. *Barbour*, 549 F.2d 5, 7 (7th Cir. 1977); *cert. denied*, 431 U.S. 908 (1977); *Wellens* v. *Dillon*, 302 F.2d 442 (9th Cir. 1962). To the extent that appellants' Jurisdictional Statement can be construed as a petition for writ of certiorari, the petition must be denied for reasons stated *infra* at Part III.

Rule 35 in its order preliminarily deeming the case to be properly certified, 519, F.2d 821, 902 n.2 (D.C. Cir. 1975), in subsequently directing the district court to prepare a factual record the court assumed §437h as the basis for its jurisdiction. Moreover, the overriding circumstances of *Buckley* precluded defendant-appellees from contesting the appealability of the court of appeals' *en banc* decision. This Court merely observed that "[j]urisdiction was asserted under 28 U.S.C. §§1331, 2201 and 2202, §315(a) of the Act, 2 U.S.C. §437h(a)(1976 ed., Supp. IV)." 424 U.S. at 8. *See also, Clark* v. *Valeo,* 559 F.2d 642 (D.C. Cir. 1977)(en banc)(per curiam), *aff'd sub nom. Clark* v. *Kimmitt,* 431 U.S. 950 (1977) (this Court affirmed the *en banc* decision that the constitutional questions certified under §437h were not ripe for review); *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980)(en banc)(per curiam), *aff'd,* 100 S. Ct. 1639 (1980) (this Court affirmed the *en banc* decision which answered a constitutional question certified under §437h). The court of appeals decisions in both *Clark* and *RNC* were specifically rendered pursuant to §437h.

Where, as in this case, the court below disclaims §437h as the basis for its *en banc* decision, the right of direct appeal provided for in §437h is not available. Accordingly, the Court should dismiss this appeal because it is not taken in conformity with statute.

II. This Court Lacks Jurisdiction Over This Action Because Appellants May Not Use The Extraordinary Procedure of 2 U.S.C. §437h To Circumvent Judicial Review Through The Enforcement Proceeding Pending Against Them Under 2 U.S.C. §437g.

By bringing an action in the district court pursuant to §437h, appellants attempted to circumvent the enforcement proceeding pending against them under 2 U.S.C. §437g. However, 2 U.S.C. §437g, providing for the initiation of civil enforcement actions by the Commission, an expedited procedure for appeal to a United States court of appeals and review by this Court upon certiorari or certification, is the exclusive method of judicial review available to appellants.

Congress has provided an orderly and carefully balanced system of remedies and judicial review for persons affected by the enforcement process of the Act. The Commission, reconstituted after this Court's decision in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), has broad authority to administer and seek compliance with the Act's provisions, *see* 2 U.S.C. §§437c(b), 437d(a), 437f, 437g, 438, and has exclusive jurisdiction for civil enforcement of the Act, *see* 2 U.S.C. §§437c(b)(1), 437d(e). Persons who feel they may be adversely affected by the Act may seek an advisory opinion from the Commission concerning the application of the statute or of a rule or regulation prescribed by the Commission. 2 U.S.C. §437f. However, once made the subject of the Act's enforcement process, such persons are relegated to a well planned system for resolution of the claims involved. *See* 2 U.S.C. §437g(a)(1),(a)(3), (a)(4), (a)(6), (a)(9), (a)(10).

Congress could not have intended that persons made the subject of the enforcement procedures of

§437g would be able to defeat that process by invoking the unusual procedure of §437h. The legislative history of §437h indicates that it was intended by its sponsor, Senator Buckley, for the narrow purpose of allowing expeditious review of his contemplated challenges to what became the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. 120 Cong. Rec. 10562 (1974). The provision is limited by its very terms to actions "*as may be appropriate* to construe the constitutionality of any provision of this Act" (emphasis added). Only a specified class of eligible plaintiffs — the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President — is permitted to invoke §437h. By at the same time establishing a detailed statutory scheme for persons brought into the enforcement process, with ample opportunity for judicial review, Congress intended §437h to have a separate, limited purpose.[5]

The United States District Court for the District of Columbia has recognized that the Commission's enforcement actions cannot be circumvented by an action to certify constitutional questions under §437h. *National Right to Work Committee* v. *Federal Election Commission, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122

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[5] Where, as in the present case there is clearly an adequate procedure for obtaining judicial review of the statutory provisions challenged, equitable concepts preclude courts from invoking the machinery of §437h. *See United States* v. *Clifford,* 409 F. Supp. 1070 (E.D.N.Y. 1976)(no need to invoke §437h in a criminal action since adequate review may be had on appeal); *see also, analogously, Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 929 (1975)(equitable concepts precluded granting injunctive and declaratory relief where a pending state civil proceeding was initiated shortly after federal suit).

(D.D.C. Apr. 24, 1980), *appeal docketed,* No. 80-1488 (D.C. Cir. May 7, 1980). In *NRWC,* persons who were the subject of an enforcement proceeding before the Commission filed suit in the United States District Court for the Eastern District of Virginia challenging the constitutionality of the provisions of FECA involved in the enforcement proceeding, and moved to certify constitutional questions pursuant to §437h. The Commission filed its civil enforcement action in the United States District Court for the District of Columbia shortly thereafter. *Federal Election Commission* v. *National Right to work committee, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122, *appeal docketed,* No. 80-1487 (D.C. Cir. May 7, 1980). The District of Columbia court consolidated the cases and, without certifying constitutional questions to the court of appeals, upheld the constitutionality of the provisions attacked. The decision has been appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to the conventional procedure of 2 U.S.C. §437g.

Section 437h has been narrowed by most federal courts faced with its construction. Thus, the United States Court of Appeals for the District of Columbia Circuit stated in *Clark* v. *Valeo,* 559 F.2d 642, 646 n.2 (D.C. Cir. 1977)(per curiam), *aff'd sub nom. Clark* v. *Kimmitt,* 431 U.S. 950 (1977):

> A district judge requested to make certification under §437h should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court *en banc.* . . .

See also Mott v. *Federal Election Commission,* No. 79-3375 (D.D.C. June 30, 1980) *appeal docketed,* No. 80-1949 (D.C. Cir. Aug. 12, 1980)(§437h action dismissed for lack of ripeness and failure to state a claim); *Gifford* v. *Congress,* 452 F. Supp. 802 (E.D. Cal.

1978)(constitutional questions need not be certified when action deemed frivolous).

The standing requirement of §437h was tightly construed in *Martin Tractor* v. *Federal Election Commission,* 460 F. Supp. 1017 (D.D.C. 1978), *aff'd on grounds not based on §437h,* No. 79-1027 (D.C. Cir. May 8, 1980)(limited to actions by eligible voters who put at issue their rights as voters). *Contra, Bread Political Action Committee* v. *Federal Election Commission,* 591 F.2d 29 (7th Cir. 1979). A narrow reading was also given §437h in *Republican National Committee* v. *Federal Election Commission,* 461 F. Supp. 570 (S.D.N.Y. 1978)(court denied motion to intervene under §437h because to permit intervention would give every eligible voter in the United States the same right).[6]

To permit individuals to nullify the orderly enforcement procedures enacted by Congress at 2 U.S.C. §437g not only sanctions a waste of judicial resources (enforcement actions initiated by the Commission preceded by separate litigation of constitutional questions which

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[6] There are, however, two instances where courts have certified constitutional questions pursuant to §437h even in the absence of a separate action brought to construe the constitutionality of the statute. In *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980)(en banc), *reh. denied,* (2d Cir. March 5, 1980), the district court in which the Commission had brought its §437g enforcement action decided *sua sponte* to certify constitutional questions raised by the defendants to the court of appeals under §437h. More recently, in the course of an appeal of a district court subpoena enforcement order, a panel for the United States Court of Appeals for the Fifth Circuit *sua sponte* submitted a constitutional question to the *en banc* court under §437h. *Federal Election Commission* v. *Lance,* No. 79-1859 (5th Cir. May 5, 1980) (*en banc* proceeding still pending). These two cases have resulted in marked departures from the intended scope of §437h.

would otherwise be raised as defenses in the enforcement action and decided only if necessary) but also runs counter to the well-established principle that courts should not prematurely adjudicate constitutional questions. *See Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936)(Brandeis, J., concurring).

Allowing appellants to invoke 2 U.S.C. §437h in this situation will be a signal that every person against whom the Commission initiates an enforcement action may compel a court of appeals sitting *en banc* to first decide any constitutional questions raised and then require this Court to review the court of appeals' decision upon direct appeal. Such an expansive reading of §437h, as the court below recognized, J.S. App. A at A-26, would have a severe and disruptive effect on the calendars of courts of appeals, and actions might be delayed rather than expedited by the *en banc* requirement of §437h. *See* Leventhal, *Courts and Political Thickets,* 77 Colum. L. Rev. 345, 384-387 (1977). Inescapably, the opportunity for direct appeal to this Court would only encourage such suits and exacerbate the likely procedural morass.

III. In The Alternative, If An Appeal Lies Under §437h, The Court Should Summarily Affirm The Decision Below Because The Questions Certified Were Correctly Decided And Any Remaining Questions Are So Unsubstantial As Not To Need Further Argument.

Appellants ask this Court to overturn the decision of the court below upholding the constitutionality of 2 U.S.C. §441a(a)(1)(C) which limits to $5,000 per calendar year the amount which a person may contribute to a political committee.[7] Appellants contend that the $5,000 contribution limit violates their rights under the first amendment to the Constitution of the United States by preventing unlimited contributions to political committees such as CALPAC. They also claim that they are invidiously discriminated against because corporations and labor organizations, regulated under 2 U.S.C. §441b, are not subject to the $5,000 limit in paying for the establishment, administration, and solicitation expenses of their separate segregated political funds by operation of 2 U.S.C. §441b(b)(2)(C) and 2 U.S.C. §431(8)(B)(vi) (former 2 U.S.C. §431(e)(5)(F)(1976)).[8] The court of appeals correctly concluded, applying the rationale of *Buckley* v. *Valeo, supra,* that 2 U.S.C. § §431(8)(B)(vi), 441a(a)(1)(C), and 441b(b)(2)(C) are consistent with the first and fifth amendments to the Constitution of the United States. Thus, this Court should summarily affirm the decision of the court of appeals or, treating appellants' Jurisdictional Statement as a petition for certiorari, deny the petition. *See* note 4 *supra*.

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[7] *See* Appendix A for the text of §441a(a)(1)(C) and for the definitions of the terms "person", 2 U.S.C. §431(11), and "political committee", 2 U.S.C. §431(4).

[8] *See* Appendix A for the text of these provisions.

A. The $5,000 limit on contributions to political committees is constitutional.

The $5,000 limit on contributions by persons to political committees is an integral part of the comprehensive and well-balanced system of contribution limitations chosen by Congress to regulate the influence of money in federal elections. The court below properly viewed the $5,000 limit of §441a(a)(1)(C) as a necessary tool to prevent evasion of the $1,000 limitation on the amount which a person may contribute to a candidate:

> If the limits on payments to a political committee were to be erased, any association could give unlimited funds to a political committee. Donors could in effect use the the multicandidate committee as a vehicle for making $5,000 contributions to an unlimited number of candidates and thereby influence, in fact as well as appearance, the use of vast and substantial sums for direct candidate contributions. That would be an egregious distortion of the existing contribution limits of the Act, provisions specifically sustained by the Court in *Buckley.*

J.S. App. at A-8.

The constitutional analysis established by this Court in *Buckley* v. *Valeo, supra,* controls this case and fully supports the result reached by the court of appeals. J.S. App. A at A-13. In upholding the $1,000 limit on contributions to candidates, *Buckley*, 424 U.S. at 23-35, this Court found a clear distinction between a person spending money directly for speech and giving money to someone else to be spent for speech:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability

> to engage in free communication. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21. Thus, this Court upheld the $1,000 limitation on contributions to a candidate against challenges that the limitation unconstitutionally infringed upon both direct speech rights and associational rights. *Id.* at 22, 26, 27.

As the court below found, the contribution limitation attacked by appellants serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley*. J.S. App. A at A-13 to A-15. The limitation of §441a(a)(1)(C) is a "proper mechanism" to ensure compliance with the $1,000 limitation on contributions to a candidate, J.S. App. A at A-17, for it prevents persons from contributing massive unlimited sums to political committees such as CALPAC thereby effecting contributions to candidates well beyond $1,000 in amount.[9]

For virtually identical reasons this Court in *Buckley* upheld the overall $25,000 limitation on contributions

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[9] CMA, an unincorporated association, is not subject to an annual overall $25,000 contribution limitation as are individuals. *See* 2 U.S.C. §441a(a)(3). CALPAC, in turn, as a multicandidate committee, *see* 2 U.S.C. §441a(a)(4), may contribute up to $5,000 to as many candidates as it chooses.

by individuals, whether to candidates or to political committees, former 18 U.S.C. §608(b)(3)(1974); present 2 U.S.C. §441a(a)(3):

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

424 U.S. at 38.[10]

Appellants suggest that a limitation on contributions to a political committee is like the limitation on independent expenditures invalidated in *Buckley* v. *Valeo,* 424 U.S. at 39-51, rather than like the limitations on contributions upheld by the Court. J.S. at 21. But, as the court below correctly observed, J.S. App. A. at A-11 n.5, to the extent that persons wish to contribute to a political committee with a "broad and diverse constituency of supporters" and thereby relinquish control over the disposition of funds, the impact on their

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[10] This Court upheld a stricter limitation in *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980)(en banc)(per curiam), *aff'd,* 100 S. Ct. 1639 (1980)(total prohibition on private contributions to publicly-funded presidential candidates was held constitutional under first amendment standards).

associational freedoms is no more severe if those in control of the political committee decide to make independent expenditures rather than contributions.[11] The associational right of the contributor is in the giving, not in the disposition by the political committee.[12] Moreover, to the extent persons wish to use their funds without limit for direct independent expenditures, that avenue is always open to them acting separately. J.S. App. A at A-11 n.5. Finally, political committees such as CALPAC are not themselves limited in the amount of independent expenditures they may make on behalf of candidates.[13] The $5,000 limit on contributions to CALPAC does not limit the overall amount which CALPAC may receive to make independent expen-

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[11] The court in *Mott* v. *Federal Election Commission, supra,* specifically disclaimed the argument made by appellants here that §441a(a)(1)(A) is unconstitutional because political committees may choose to make independent expenditures. The court there held that "[t]ransfers of money to enable another to speak are not entitled to the same deference as direct expenditures, and are consequently subject to reasonable regulation." *Id.,* Memorandum Opinion at 8, 9. The Commission has included the *Mott* decision herein as Appendix B.

[12] CALPAC, engages in relatively little independent expenditure activity and therefore its supporters cannot claim the harm to which CALPAC alludes. Public reports filed by CALPAC indicate that in the last election cycle of 1977-1978, its receipts totalled $705,755.72 for the period. Of that amount, $26,100 was expended for contributions to federal candidates, while none was spent for independent expenditures on behalf of federal candidates. Moreover, the very purpose of securing multicandidate committee status is to enable a committee such as CALPAC to contribute larger amounts to federal candidates. *Compare* 2 U.S.C. §441a(a)(1)(A) and (2)(A). Thus, CALPAC's emphasis is clearly on making contributions to candidates rather than independent expenditures. Indeed, CMA's speech interests are one step further removed than those of the contributors to candidates analyzed in *Buckley.* CMA's speech is in giving to a political committee which itself engages primarily in making contributions to candidates rather than direct expenditures.

[13] *But see* 26 U.S.C. §9012(f).

ditures, and there is no record showing that the limit of §441a(a)(1)(C) has had a "dramatic adverse effect" on CALPAC's fundraising abilities.[14]

B. Separate regulation of corporations and labor organizations under 2 U.S.C. §441b does not invidiously discriminate against unincorporated associations or violate their first amendment rights.

This Court has stated that the act of classifying does not itself deprive anyone of equal protection of the laws. *See, e.g., Carrington* v. *Rash,* 380 U.S. 89, 92 (1965), relying on *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483 (1955), *reh. denied,* 349 U.S. 925 (1955). Since all legislation involves some degree of classification, this Court has upheld federal statutes which establish reasonable classifications. *Buckley* v. *Valeo,* 424 U.S. at 93-108; *Schesinger* v. *Ballard,* 419 U.S. 498 (1975), *reh. denied,* 420 U.S. 966 (1975); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op,* 307 U.S. 533 562-568 (1939).

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[14] In response to concerns that the limitations on contributions dealt with in *Buckley* would preclude candidates and political committees from amassing the resources necessary for effective advocacy, this Court stated:

> There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. [footnote omitted]. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21, 22. Because CALPAC is able to receive up to $5,000 from every one of CMA's members, the associational interests of CMA and its members are given substantial outlet.

Both corporations and labor organizations have traditionally been treated as special creatures of the law. *Dartmouth College* v. *Woodward,* 17 U.S. 250, 303 (4 Wheat. 518, 636)(1819); *United States* v. *White,* 322 U.S. 694, 703 (1944); *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344 (1922). Congress plainly may view corporations and labor organizations as distinct, definable organizations particularly worthy of separate classification under the law.[15]

The legislative history of 2 U.S.C. §441b establishes a compelling governmental interest in strictly limiting political expenditures of corporations and labor organizations. Congress concluded that corporations and labor organizations were able to aggregate such potentially disrupting power and influence in connection with federal elections that prohibitions on their contributions and expenditures were justified. *See Pipefitters Local Union No. 562* v. *United States,* 407 U.S. 385, 403-405 (1972); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,* 352 U.S. 567, 570-584 (1957); *United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 113, 114 (1948).[16]

[15] Where Congress has wished to treat corporations and unincorporated associations alike, it has expressly so provided. *See e.g.,* 26 U.S.C. §7701(a)(3) and *Morissey* v. *Commissioner of Internal Revenue,* 296 U.S. 344 (1935)(trust held to be association within meaning of §7701's definition of "corporation"). On the other hand, where Congress has wished to treat corporations differently than unincorporated associations, this Court has approved the distinction on grounds of "certainty of application" and deference to the legislature. *United Steelworkers of America, AFL-CIO* v. *R.H. Bouligny, Inc.,* 382 U.S. 145 (1965)(labor union not treated as corporation for diversity jurisdiction purposes). *See also* 28 U.S.C. §1332(c).

[16] Numerous federal courts have held the prohibition constitutional in the context of specific cases. *United States* v. *Chestnut,* 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied,* 429 U.S. 829 (1976); *United States* v. *Boyle,* 482 F.2d 755 (D.C. Cir. 1973), *cert.*

With the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, in what became known as the Hansen Amendment, Congress exempted from the overall ban on corporate or union political spending, *inter alia,* payment for the administration and solicitation expenses of separate segregated political funds. *See Pipefitters,* 407 U.S. at 409-412, 421-427, 429-432; present 2 U.S.C. §441b(b)(2)(C). That Congress, subsequent to the imposition of the broad ban on corporate and union contributions or expenditures, exempted certain specified payments does not negate the underlying rationale of the classification.[17]

Appellants essentially argue that Congress must permit all associations the benefit of an exception to a broad prohibition directed only at corporations and

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denied, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562,* 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc,* 434 F.2d 1127, *rev'd on other grounds,* 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee, Fed. Elec. Camp. Fin. Guide* (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed,* No. 80-1488 (D.C. Cir. 1980); *Federal Election Commission* v. *Weinsten,* 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford,* 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association,* 239 F. 163 (W.D. Pa. 1916).

[17] Appellants place reliance on this Court's holding in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), apparently for the proposition that Congress cannot differentially regulate corporations and labor organizations on the one hand, and unincorporated associations on the other. J.S. at 27-29. However, that case hardly stands for such a proposition. This Court there held that the corporate status of the plaintiff-appellee did not remove its speech from the protection of the first amendment. *Id.* at 778-786. It did not hold that the statute there involved required unincorporated associations to be regulated equally with corporations, nor did it assert such a proposition as a general principle.

labor organizations.[18] Appellants have not argued, however, that the concomitants of the broad prohibition — the total ban on making direct contributions to candidates or committees or independent expenditures on behalf of candidates — must also extend to all associations. By this attack, appellants seek to destroy the balance established by Congress in its regulation of money spent by corporations and labor organizations and that spent by individuals and other groups.

However, the statutory scheme created by Congress, by setting its present balance, has met the constitutional requirements of due process, and appellants should not be heard to complain simply because they would have enacted regulatory provisions more favorable to their organization.[19]

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[18] California has a unique state statute applicable to CMA which provides that an "organized medical society" may, without incorporating, have limited liability for its members for the debts or liabilities of the medical society. Cal. Corp. Code, Tit. 3, Chap. 3, §21200 (West 1980 Supp.).

[19] Appellants seek to raise as a separate issue in their appeal the statutory question of whether the term "membership organization" in present 2 U.S.C. §441b(b)(2)(C) means unincorporated associations such as CMA. If so construed, appellants argue, CMA could pay without limit for CALPAC's administration and solicitation expenses. However, the court below was unanimous in finding appellants' argument groundless. J.S. App. A. at A-20, A-21 (opinion of the court); A-49 to A-51 (dissent). *See also* 122 Cong. Rec. 7197-98, 12468-69 (1976).

CONCLUSION

This case should be dismissed on the ground that appellants may not invoke the appellate jurisdiction of this Court. In the alternative, for the reasons set forth above, the Court should summarily affirm the decision below because the court of appeals correctly decided the issues raised herein, applying principles established by this Court. To the extent that the jurisdictional statement may be construed as a petition for certiorari, the petition should be denied.

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A

Statutes Involved

I. 2 U.S.C. §437g.....

II. 2 U.S.C. §437h.....

III. 2 U.S.C. §441a(a)(1)(C).....

IV. 2 U.S.C. §441b.....

V. 2 U.S.C. §431(8)(B)(vi); former 2 U.S.C. §431(e)(5)(F).....

VI. 2 U.S.C. §431(4), 431(11).....

I.

2 U.S.C. §437g Enforcement

(a)*Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint, shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in

the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause ex-

cept pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter

96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against

whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph A shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calender quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar

year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which contitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

II.

2 U.S.C. §437h. Judicial review

(a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) *Advancement on appellate docket and expedited disposition of certified questions.* It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

III.

2 U.S.C. §441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

IV.

2 U.S.C. §441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation,

national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraph (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicita-

tions for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted

by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

V.

2 U.S.C. §431 Definitions

(8) (B) The term "contribution" does not include—

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

former 2 U.S.C. §431 (1976) Definitions

(e) "contribution"—

(5) does not include—

(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;

VI.

2 U.S.C. §431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STEWART RAWLINGS MOTT, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

Civil Action No. 79-3375

MEMORANDUM OPINION

Barrington D. Parker, *District Judge:*

Plaintiffs Stewart Mott, Patricia Stahlman, and the National Conservative Political Action Committee (NCPAC) have brought this suit for declaratory and injunctive relief against the Federal Election Commission (FEC) and its members. They allege that certain provisions of the Federal Election Campaign Act of 1971, as amended, (FECA), FEC regulations, and FEC advisory opinions and opinion letters are, unconstitutionally overbroad and vague both on their face and as applied because they interfere with plaintiffs' ability to make certain contributions and independent expenditures.[1] Defendants have moved to dismiss on the grounds

[1] Plaintiffs allege that the following sections of the Federal Election Campaign Act, as amended, are unconstitutionally overbroad or vague: 2 U.S.C. §431(4) (formerly 431(d) which defines "political committee"; section 431(8) (formerly 431(e) which defines "contribution"; section 441a(a)(1)(C) which limits contributions to political committees (other than candidates and national party committees) to $5000 per year; section 441a(a)(2)(C) which limits a multicandidate committee's contributions to political committees

that some of the claims are not ripe for adjudication while others fail to state a claim upon which relief can be granted.[2] Common Cause, appearing as *amicus curiae*,[3] has also filed a brief urging dismissal. After weighing the arguments presented by the parties and *amicus*, the Court concludes that the complaint should be dismissed.

BACKGROUND

Plaintiffs' claims flow from two types of contemplated activity. First, plaintiff Mott states that he wishes "to join with other like-minded individuals in purchasing. . .advertising space" in the *New York Times* "in order to publicize his views," but that he fears the FEC will consider this joint

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(other than candidates and national party committees) to $5000 per year; section 441a(a)(2)(C) which limits a multicandidate committee's contributions to political committees (other than candidate or party committees) to $5000 per year; and section 441a(a)(3) which limits total contributions by an individual to $25,000 per year.

Plaintiffs allege the following regulations are similarly overbroad or vague: 11 C.F.R. §110.14 which defines a "single candidate committee"; section 110.1(d) which imposes limits on contributions to committees making independent expenditures; section 110.1(h) which regulates contributions to a committee supporting a candidate, if the contributor has already contributed directly to the candidate's committee; and section 110.2(a)(3) which restates the limitation set in 2 U.S.C. §441a(a)(2)(C).

[2] In its motion, the FEC originally asked that all but two of plaintiffs' claims be dismissed and that the remaining two, the challenges to the $5,000 limit on contributions to political committees and to the definition of "contribution," be prepared for certification to the Court of Appeals. At the hearing on the motion to dismiss, however, counsel for the FEC stated that the Commission had revised its assessment in light of recent developments and now believed that the entire case should be dismissed. Transcript of Hearing on Motion to Dismiss, June 20, 1980 (Transcript) 17-18.

[3] Common Cause is a non-profit membership corporation with approximately 225,000 members which has participated actively in congressional consideration of the statutes challenged in this case and in numerous cases concerning the constitutionality and implementation of the federal election laws.

endeavor to be a "political committee" under FECA and require it to register as such. In addition, Mott claims that the FEC will apply the amount spent in the joint purchase against the various dollar limits FECA imposes on contributions to political committees by an individual.

Plaintiff Stahlman alleges that she wishes to contribute more than the section 441a(a)(1)(C) limit of $5000 to NCPAC to enable that organization to make independent expenditures. She claims she has not done so because the FEC will interpret this to be a contribution in excess of the statutory limits, even though it is "earmarked for the purpose of NCPAC's making of independent expenditures"—the type of expenditure which under *Buckley* v. *Valeo,* 424 U.S. 1 (1976), cannot constitutionally be limited. In addition, Stahlman objects that these contributions to NCPAC would be counted against the $25,000 annual limit on contributions in section 441a(a)(3). Mott expresses a similar desire to contribute to a "single-issue" organization, but specifies neither the amount nor the recipient of his contemplated donation. Plaintiffs charge that the FECA provisions and FEC regulations proscribing these activities are unconstitutionally vague and overbroad, both as applied to these plaintiffs, and on their face, and ask that these challenges be certified to the en banc Court of Appeals pursuant to 2 U.S.C. § 437h.[4]

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[4] Plaintiffs seek certification under 2 U.S.C. §437h which provides:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality, of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Jurisdiction is also alleged under 28 U.S.C. §1331.

There is some question as to whether plaintiff NCPAC has standing to invoke the certification provision in section 437h, since it is

ANALYSIS

Despite the mandatory phrasing of the certification provision, district courts presented with complaints brought under section 437h need not automatically certify every constitutional question raised to the en banc court of appeals. *See Martin Tractor Company* v. *FEC,* No. 78-2080, *National Chamber Alliance for Politics* v. *FEC,* No. 79-1027(D.C. Cir. May 8, 1980)(consolidated appeals hereinafter referred to as *Martin Tractor)(unripe constitutional questions may be dismissed and need not be certified); Gifford* v. *Congress,* 452 F. Supp. 802, 806 (E.D.Cal. 1978)(frivolous constitutional questions may be dismissed without certification). The district court's role in a 437h case has been compared to that of a single judge presented with a motion to seek the convening of a three judge court to hear constitutional challenges. *See Clark* v. *Valeo,* 559 F.2d 642, 645-46 (D.C. Cir.)(en banc), *aff'd* 431 U.S. 950 (1977). Under the three judge court statutes, a single judge could dismiss constitutional claims which had already been decided, without convening the special panel. *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962).

At least one district court has believed that a complaint must state "substantial" constitutional questions in order to invoke the certification process. The first court to be presented with a section 437h request observed that the case should be expedited "provided only that a substantial constitutional question is raised by a complaint and that complaint is filed by a party having standing to lodge it." *Buckley* v. *Valeo,* 387 F. Supp. 135, 138 (D.D.C.) *remanded,* 519 F.2d 817 (D.C. Cir. 1975)(en banc). In remanding the Court of Appeals did not disturb the district court's express finding that "the plaintiffs raise substantial constitutional questions." 387 F. Supp. at 138. The Court of Appeals directed only that the district court specifically identify the

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not among the categories of persons named in the statute. *See Martin Tractor* v. *FEC,* No. 78-2080, 6 n.6 (D.C. Cir. May 8, 1980). The Court need not decide this question, since NCPAC's claims are essentially the same as those presented by plaintiff Stahlman, who clearly has standing to raise them under section 437h.

questions presented and take whatever evidence was necessary to make findings of fact to augment the record before certifying the identified questions. 519 F.2d at 818.

Judicial interpretation of the section 437h procedure thus suggests that this Court may initially review a complaint to determine if it presents a ripe and substantial constitutional controversy before certifying questions to the en banc court of appeals.[5]

The legislative history of the certification provision is not at odds with this interpretation. Section 437h was inserted into the Federal Election Campaign Act by an amendment offered by Senator Buckley to the Federal Election Campaign Act Amendments of 1974.

Senator Buckley believed major portions of the 1974 legislation to be unconstitutional. *See* 120 Cong. Rec. 10557-62 (1974). Although unsuccessful in his efforts to have the offending provisions dropped from the bill, he managed to persuade his colleagues to include the expedited review procedure now embodied in section 437h. In explaining the purpose of his amendment he stated:

> It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562. The amendment was accepted without debate and without prejudice. *Id.* at 10563. Arguably,

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[5] As to whether a question is substantial or not, the Supreme Court has observed, again in the context of three judge court proceedings:

> The lack of substantiality in a federal question may appear either because it is so obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court.

California Water Service Co. v. *City of Redding,* 304 U.S. 252, 255 (1938)(per curiam). *See Green* v. *Board of Elections,* 380 F.2d 445, 448 (2d Cir. 1967).

Senator Buckley was concerned only with the expedited review of the sweeping changes contained in the 1974 Amendments.[6] In any event, it is apparent that he felt that the expedited procedure should be available only where a "serious" constitutional question was presented. Presumably other claims were to be screened out and dismissed by the district court. *See Gifford*, 452 F. Supp. at 807, 810.[7] After reviewing the claims presented by the complaint in this case, the Court concludes that they should be dismissed.

The Court finds that those claims which derive from Mott's desire to purchase advertising space in the *New York Times* are not ripe for judicial decision. On the basis of the limited facts outlined in the complaint, the Court cannot determine whether Mott's joint purchase of advertising space would be covered by those sections of FECA regulating contributions to political committees. Mott insists that he can discern an FEC policy which indicates that the agency would consider his behavior to be covered by the Act. *Amicus*, however, argues that a straightforward application of the definitions of "contribution" and "political committee" places a "joint purchase" of advertising space beyond the reach of statute and regulations. Mott's statement of his claims aggravates this problem of interpretation. The allegation that Mott wishes to "join with others" is broad enough to encompass a spectrum of association from a single meeting of would-be advertisers at the *New York Times* where separate checks are tendered, to a full fledged political committee contemplating a series of advertisements and solicitations to support their activities. Plaintiff, however, has declined to be more specific.[8] Clearly, a federal court should not pass on constitutional questions in the absence of a more fully developed factual record. *See Martin Tractor*, slip op. at 25.

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[6] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 385 (1977).

[7] Automatic certification of *all* constitutional questions to an en banc court of appeals could compound the difficulties inherent in en banc proceedings. *See* Leventhal, *supra* note 6, at 385.

[8] *See* Transcript at 34-37.

Mott's claims present another problem. Mott has asked the Court to determine if certain sections of the Act and regulations apply to him, and, if they do, certify certain constitutional questions presented by those provisions to the Court of Appeals. The first part of that request is misdirected. The Federal Election Campaign Act gives the FEC the power to issue advisory opinions on the application of the statute and regulations in specific situations. The Act was recently amended to make the advisory opinion process available to all "persons" and requires the Commission to respond within sixty days.[9] To date, the FEC has not rendered an opinion on the situation Mott appears to be advancing, and Mott has not requested one. Because such a ruling could dispose of the issues Mott presents, and because of the ripeness problems inherent in Mott's claims, the Court will dismiss this first aspect of the complaint. *See Martin Tractor*, slip op. at 27.

The second aspect of the complaint attacks the statutory and regulatory provisions which limit contributions to political committees purportedly made to enable those committees to make independent expenditures. This aspect involves primarily plaintiff Stahlman's claims. Stahlman asserts that she wishes to contribute more than $5,000 to NCPAC to enable that organization to make independent expenditures, but that she is prevented from doing so by the $5,000 limita-

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[9] Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, §107 (January 8, 1980). Final Congressional action on this legislation was completed on December 20, 1979, three days after plaintiffs brought this action on December 17.

In support of their request to have the Court interpret FEC policy, plaintiffs rely on the Second Circuit's decision in *FEC* v. *Central Long Island Tax Reform Immediately Committee (CLITRIM)*, No. 79-3014 (2d Cir. Feb. 5, 1980). *CLITRIM*, however, is distinquishable on the grounds that it involved constitutional challenges brought as defenses to an FEC enforcement action. There was no need for the Court to divine FEC policy on an indefinite set of facts; both the legal and factual background were well-established.

tion imposed by section 441a(a)(1)(C) and by the overall $25,000 limitation in section 441a(a)(3). Since under *Buckley* v. *Valeo*, 424 U.S. 1, 58-59 (1976) there can be no limits on independent expenditures by a person or a political committee, Stahlman argues that there can be no limit on what she styles as "donations" made to finance independent expenditures by political committees such as NCPAC.[10]

Stahlman's claims in essence present three identifiable constitutional questions which may be stated as follows:

(1) Whether the definition of "contribution" in section 431(8), is unconstitutionally overbroad or vague under the first and fifth amendments in that it applies to donations by a person to a political committee made for the purpose of enabling that committee to undertake independent expenditures?

(2) Whether section 441a(a)(3), which limits total contributions by an individual within any calendar year to $25,000 is unconstitutional under the first and fifth amendments?

(3) Whether section 441a(a)(1)(C), which limits contributions by a person to a political committee to $5,000 in any calendar year, is unconstitutional under the first and fifth amendments?

The *Buckley* decision answers each question in the negative. The $25,000 overall limit on contributions was specifically upheld as a "corollary of the basic individual contribution limitation" found to be constitutional. 424 U.S. at 38. Moreover, in ruling on the constitutionality of the contribution limitations, the Court used and implicitly sustained the Act's definition of "contribution" which, the Court noted, included "dollars given to another person or organization that are earmarked for political purposes. . . ." 424 U.S. at 24 n.24.

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[10] Transcript at 51. Stahlman's contemplated transfer is nonetheless a "contribution" under 2 U.S.C §431(8) (formerly 431(e).

As to the third question, although the Court in *Buckley* did not specifically consider the $5,000 limit on contributions to political committees contained in section 441a(a)(1)(C),[11] the reasoning in the Supreme Court's per curiam opinion clearly indicates that the restriction is constitutional. In *Buckley,* the Court explained the rationale for sustaining contribution limits:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. . . .
>
> By contrast with a limitation upon expenditures for political expression, a limititation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated,

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[11] This limitation was added after the Supreme Court's decision in *Buckley* v. *Valeo* by the Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, §112, 90 Stat. 475, 486 (1976).

> symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contributor's freedom to discuss candidates and isssues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. (Footnotes omitted.)

Id. at 19-21.

In short, a limitation on contributions infringes far less on first amendment freedoms than does a limitation on expenditures, because it involves restrictions on indirect rather than on direct expression. Whatever infringement does occur is justified by the compelling need to curb the "actuality and appearance of corruption" flowing from large individual contributions. *Id.* at 26.

Plaintiffs point out that in *Buckley,* the Supreme Court had before it only limits on contributions to candidates and not contributions to 'independent" political committees. According to plaintiffs the interest in limiting contributions to candidates—the limitation of the actuality or appearance of a *quid pro quo* for large political contributions—disappears when the contribution is made to a committee such as NCPAC. Plaintiffs conclude that limits on these contributions to fund independent expenditures thus abridge first amendment guarantees without the necessary justification.

Congress, however, felt otherwise, The Conference Committee Report on the Federal Election Campaign Act Amendments of 1976 explained the reasons for the limitation on con-

tributions to non-candidate committees contained in 441a(a)(1):

> [F]irst, these limits restrict the opportunity to circumvent the $1000 and $5000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions that the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Rep. No. 94-1057, 94th Cong., 2d Sess. 57-58 (1976). As the first and third reasons cited in the report demonstrate, Congress was clearly concerned that the "independent" political committee might become a vehicle for avoiding the restrictions placed on direct contributions to candidates.

The en banc Ninth Circuit recently approved this rationale in *California Medical Association (CMA)* v. *FEC*, No. 79-4426, slip op. 4-13, (9th Cir. May 23, 1980)(en banc)(summarized at 48 L.W. 2828 (June 24, 1980)) when it sustained the $5,000 limit on contributions to political committees against a constitutional challenge brought pursuant to section 437h. The *CMA* court found *Buckley* controlling, and held that section 441a(a)(1)(C)'s $5,000 limit imposed a minimal and narrowly-drawn restriction on the plaintiff association's first amendment rights, and that this restriction was justified by the important governmental interest involved. Slip op. at 12-13. In a footnote, the Ninth Circuit discussed the impact of this particular contribution limit on free expression and found it comparatively slight; those who but for the limits would contribute large amounts to help finance independent expenditures by political committees are still free to spend as much as they wish on their own. Slip op. at 9 n. 5.

In sustaining the $5,000 limit on contributions to political committees *CMA* merely applies the *Buckley* rationale that transfers of money to enable another to speak are not entitled

to the same deference as direct expenditures, and are consequently subject to reasonable regulation. These two authorities foreclose any challenge to the $5,000 contribution limits and require that plaintiff Stahlman's claims be dismissed along with plaintiff Mott's.

An appropriate Order accompanies this memorandum.

/s/ BARRINGTON D. PARKER

United States
District Judge

Entered: June 30, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEWART RAWLINGS MOTT, *et al.*,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 30 day of June, 1980

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed for the reasons that:

(1) plaintiff Mott's challenges concerning his desired advertisement activities are dismissed as not presenting a ripe case or controvery (Fed R. Civ. P. 12(b)(1));

(2) plaintiffs' challenges to those provisions of the Federal Election Campaign Act limiting contributions are dismissed as an issue already decided by the Supreme Court (Fed R. Civ. P. 12(b)(6)).

/s/ BARRINTON D. PARKER

Barrington D. Parker
United States
District Judge

Supreme Court, U. S.
FILED
SEP 17 1980
MICHAEL PODAK, JR., CLERK

No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit En Banc

BRIEF OPPOSING MOTION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

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No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit En Banc

BRIEF OPPOSING MOTION TO DISMISS THE APPEAL OR IN THE ALTERNATIVE TO AFFIRM

ARGUMENT

I

Jurisdiction to hear this appeal exists by virtue of 2 U.S.C. § 437h(b), regardless of whether the Court of Appeals sat en banc pursuant to Rule 35 when passing on questions certified pursuant to § 437h(a)

The Federal Election Commission ("the Commission") argues this Court lacks jurisdiction to hear the appeal because the court of appeals sat *en banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure, rather than pursuant to § 437h(a).[1] Motion of the Federal Election Commission to Dismiss or in the Alternative to Affirm at 6-7 ("Motion ....."). This argument confuses this Court's appellate jurisdiction under § 437h(b) with the jurisdiction of the court of appeals to render a decision on the certified questions under § 437h(a) and the concurrent mandate of § 437h(a) that the court of appeals sit *en banc*.

Jurisdiction to hear this appeal is based on § 437h(b), which provides in pertinent part:

> . . . any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States . . .

Once the court of appeals has decided "a matter certified under subsection (a)" the right of appeal to this Court lies. Nothing in § 437h(b) requires the court of appeals to sit *en banc* pursuant to § 437h(a) as a prerequisite for this

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[1]All citations are to the Federal Election Campaign Act of 1971, P.L. 92-225, 2 U.S.C. § 431 *et seq.*, as amended, unless otherwise noted. Pertinent provisions are reproduced in Appendix B to the Jurisdictional Statement and Appendix A to the Commission's Motion.

Court's jurisdiction. Instead, jurisdiction is premised on certification by the district court to the court of appeals pursuant to § 437h(a), and a decision by the court of appeals on the certified questions.

The Commission's reliance on § 437h(a) is misplaced. The last sentence of § 437h(a) directs the district court to certify constitutional questions to the appropriate court of appeals, and directs the court of appeals to hear the certified questions sitting *en banc*. Clearly, this provision has two separate mandates: that the court of appeals hear the certified questions, and that it sit *en banc* to do so.

Instead of ruling on the validity of the *en banc* requirement, the court avoided the issue by exercising its discretion under Rule 35 to hear the matter *en banc*.[2] This was simply the exercise of judicial prudence. Rather than address what might be "delicate questions," the court skirted the constitutional issue, noting that the importance of the case warranted an *en banc* hearing pursuant to Rule 35. *CCH* at 50,997, J.S. App. at A-26. Invocation of Rule 35 in no way intrudes on this Court's jurisdiction pursuant to § 437h(b). Jurisdiction here does not depend on how the court of appeals sat when passing on the certified questions, but only on the fact that a decision was entered on a matter properly certified pursuant to § 437h(a). It is self-evident that the court of appeals rendered a decision on a matter certified pursuant to § 437h(a). An appeal therefore lies

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[2]The court of appeals requested the parties to address the constitutionality of the requirement that it sit *en banc*. Order by Chief Judge Browning filed August 1, 1979, Appendix E. Obviously the court had reservations about the practicality or validity of the requirement it hear such cases *en banc*. *California Medical Association, et al. v. Federal Election Commission, et al.*, ... F.2d .... (9th Cir. 1980), *Federal Election Campaign Financing Guide* (*CCH*), ¶ 9127 at 50,996-50,997, Jurisdictional Statement, Appendix A at 24-27 ("J. S. App. ....").

pursuant to § 437h(b). The Commission's arguments regarding Rule 35 are irrelevant and erroneous. This Court has jurisdiction.

II

Enforcement proceedings under § 437g do not bar proceedings brought under § 437h

The Commission argues that when enforcement proceedings pursuant to § 437g are underway those proceedings provide the exclusive forum to raise constitutional challenges to the Act. Motion at 8-12. In essence the Commission argues that by instituting enforcement proceedings pursuant to § 437g it cuts off the rights of the respondent to invoke the expedited judicial review provisions of § 437h. Nothing in the statute suggests, much less mandates, this conclusion. Indeed, the statute is silent on the interrelationship between §§ 437g and 437h. On their face, these provisions appear to be exclusive of one another. Nor do the cases cited by the Commission support the conclusions urged.

The enforcement mechanism established by § 437g requires that the Commission proceed in stages. Initially, the Commission may act upon receipt of a sworn complaint and notification to the person who has allegedly violated the Act. § 437g(a)(1). The Commission may also act on the basis of information it has ascertained in the normal course of its activities. § 437g(a)(2). A respondent is entitled to notice from the general counsel on a recommendation by the general counsel to "proceed to a vote on probable cause". The respondent may file a brief in response. § 437g (a)(3). If the Commission determines there is probable cause to believe a violation exists it must attempt for a period of at least 30 days to correct or prevent the alleged violation by informal methods of conference, conciliation and persuasion. § 437g(a)(4)(A)(i). If the Commission has probable cause to believe that a knowing and willful viola-

tion of the Act has occurred, it may refer the apparent violation to the Attorney General. § 437g(a)(5)(C). If a conciliation agreement is violated, the Commission may institute a civil action. § 437g(a)(5)(D). If conciliation efforts are unsuccessful, the Commission may institute a civil action. § 437g(a)(6). Judgment entered by a district court pursuant to § 437g may be appealed to the court of appeals, but is only reviewable by the Supreme Court by certiorari or certification. § 437g(a)(9).

By comparison to the expedited judicial review provisions of § 437h, the administration process set forth in § 437g involving, *inter alia*, notification, investigation, reply by the respondent, informal conference and conciliation, litigation in the district court, appeal to the court of appeals, and a petition for certiorari are potentially more time-consuming, cumbersome and uncertain. The impact of the Commission's argument is that once this process is underway the only recourse a respondent has is to wait until suit is filed to raise constitutional issues. In contrast, § 437h fulfills the Congressional mandate of prompt judicial relief where constitutional questions are involved by creating a mechanism for expedited judicial review. There is simply nothing in the language of the statute to justify the Commission's conclusion that once proceedings are under way pursuant to § 437g the respondent is deprived of the way to invoke § 437h and receive a prompt determination of constitutional questions. This is so even despite § 437g(a)(10), which causes enforcement actions to be advanced on the docket. This section specifically provides that enforcement proceedings shall be advanced ahead of all other actions, except actions brought under § 437h.

The contrast between § 437g and § 437h was outlined in *Bread Political Action Committee v. Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979). In deciding that certain persons not specifically named in § 437h(a) had standing to

invoke the expedited judicial review provisions, the court identified three Congressional purposes for § 437h, stating:

> . . . the language used and the nature of the review mechanism provided in § 437h show a Congressional intent to allow speedy judicial review of all possible constitutional challenges to any provision of the Act and to make certain that such challenges would be decided by the Supreme Court. Thus, three Congressional purposes are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenge to the Act.

591 F.2d at 33. In reaching this conclusion the court underscored the distinction between the review mechanism, noting that § 437g(a)(10) (then denoted § 437g(a)(11)) ". . . makes it clear that Congress intended § 437h actions to take place precedence even over enforcement proceedings." 591 F.2d at 33.

The purpose of the expedited judicial review provisions of § 437h is not to defeat the purposes of an enforcement proceeding (Motion at 9) or to nullify the orderly enforcement process (Motion at 11) but merely to allow for the prompt resolution of valid constitutional questions. *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d at 33. The present matter illustrates the concurrent operation of §§ 437g and 437h. The enforcement action, filed by the Commission after CMA filed the present action, was tried in March, 1980. *Federal Election Commission v. California Medical Association,* et al., No. C-79-1197-WHO (N.D. Cal., filed May 22, 1980). The parties are awaiting a decision by the district court. In that proceeding the district court denied a motion by CMA to stay the proceedings pending final resolution of the present matter. Thus, the enforcement action has proceeded without interference occasioned by separate proceedings under § 437h.

The Commission's analysis also ignores the distinction in the final relief available to a respondent in an enforcement action brought pursuant to § 437g and the plaintiff in an action brought under § 437h. In an enforcement proceeding the respondent may appeal to the court of appeals, but § 437g(a)(9) provides that the decision of the court of appeals may be reviewed by the Supreme Court only on a writ of certiorari or by certification. In contrast, § 437h (b) provides the option of an appeal to the Supreme Court.

The Commission cites several cases for the proposition that the enforcement proceeding provides the exclusive mechanism to raise a constitutional question. The cases are all distinguishable. *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir. 1977) (en banc) (per curiam), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977), turned on the lack of ripeness and failure to present a justiciable issue. *Mott v. Federal Election Commission,* No. 79-3375 (D.D.C. June 30, 1980) *appeal docketed* No. 80-1949 (D.C. Cir. August 12, 1980) (Motion, Appendix B) turned on the lack of ripeness and the absence of a fully developed factual record. In *Gifford v. Congress,* 452 F.Supp. 809 (E.D. Cal. 1978) the court found that the constitutional challenges were frivolous. *Martin Tractor Co. v. Federal Election Commission,* 460 F.Supp. 1017 (D.D.C. 1978) *aff'd on non-§ 437h grounds,* No. 79-1027 (D.C. Cir. May 8, 1980) involved the explicit statutory grant of standing contained in § 437h(a) and the absence of ripeness. Unlike *Martin Tractor,* there is no allegation or inference in the present case of an absence of a justiciable controversy. Clearly the requirements of Article III of the Constitution have been satisfied, given the institution of enforcement proceedings against CMA and CALPAC.

Nowhere does the Commission distinguish the reasoning of *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d 29 (7th Cir. 1979). There the court construed § 437h(a) as providing standing not only to those

parties explicitly mentioned in the statute, but to any party able to state a claim which meets the requirements of Article III. The court properly gave § 437h a broad interpretation to satisfy the Congressional intent that constitutional questions be handled expeditiously, and be given comprehensive review, with the litigants ultimately having the opportunity to appeal to the Supreme Court.

In arguing that the enforcement procedures set forth in § 437g would be disrupted by actions under § 437h, the Commission also ignores the decision in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980). There the district court *sua sponte* certified constitutional questions for immediate review by the court of appeals. The second circuit held the certification procedures were applicable even though the issues had been raised by a counterclaim in an enforcement proceeding brought pursuant to § 437g, rather than a separate action under § 437h. The Commission's reference in a footnote to the CLITRIM opinion (Motion at 11, n. 6) fails to state that it was the Commission itself which took the position that the expedited judicial review provisions of § 437h applied even though the constitutional questions had been raised by a counterclaim rather than in a separate action. 616 F.2d at 49. It is disingenuous for the Commission to now argue that an enforcement proceeding under § 437g bars appellants from proceeding under § 437h.

The Commission also argues that § 437h is contrary to notions of judicial economy and the well-established principle that courts should avoid premature adjudication of constitutional questions. Motion at 11-12. Cases cited by the Commission demonstrate that courts are unlikely to be forced to prematurely adjudicate constitutional questions merely because the matter is presented pursuant to § 437h. *E.g., Federal Election Commission v. Central Long Island*

Tax Reform Immediately Committee, 616 F.2d at 51-53 (challenged provisions did not apply, no reason to consider constitutionality of the Act); *Clark v. Valeo,* 559 F.2d at 646, n.2 (district court discretion to dismiss for want of jurisdiction); *Gifford v. Congress,* 452 F.Supp. 802 (constitutional questions frivolous); *Martin Tractor Co. v. Federal Election Commission,* 460 F.Supp. at 1019-1020 (ripeness, lack of justiciable controversy).

The Commission's real argument appears that Congress made an unwise choice in permitting expedited judicial review of constitutional questions, by requiring the courts of appeals to sit *en banc,* and by granting obligatory appellate jurisdiction in the Supreme Court. The cases arising under § 437h, and in particular *Clark v. Valeo, supra,* demonstrate that the lower federal courts are not unhindered by § 437h in applying well-established constitutional doctrine to screen cases which do not present a substantial constitutional question. If a justiciable question exists, as in the present action, then it is appropriate for this Court to hear the appeal pursuant to § 437h. Significantly, the Commission does not argue the present action does not present a justiciable controversy. Policy arguments are insufficient to defeat jurisdiction here. This appeal clearly lies pursuant to § 437h.

III

The certified questions were not properly decided and argument is appropriate to permit a full presentation of the issues

This action was instituted for the limited purpose of challenging the $5,000 calendar year limit on "administrative support" which CMA may furnish to CALPAC. Administrative support is defined in § 441b(b)(2)(C) as something of value for the purpose of establishing, administering or soliciting contributions to a political committee. By

providing this support, CMA sustains CALPAC's operations without funding CALPAC's contributions to candidates. All of the certified questions are framed in terms of administrative support. J.S. App. C at A-86-A-87; *see*, J.S. at 8-10.

This action was not instituted to allow CMA to furnish unlimited cash contributions to CALPAC, which could then ultimately be used for making contributions to candidates. Motion at 14; *see,* majority opinion, *CCH* at 50,989, J.S. App. at A-5. By emphasizing the alleged abuses which would result if § 441a(a)(1)(C) was invalidated in its entirety, the Commission obscures the narrow question of whether limits on administrative support by an unincorporated association for its political action committee are valid.[3] The issues presented by this appeal involve in the first instance the narrow question of whether limits on CMA's administrative support of CALPAC can constitutionally be limited, particularly when corporations and labor organizations may provide unlimited administrative support to their political committees. It is appropriate for this Court to focus on this narrow issue, rather than problems which would allegedly result from total invalidation of the $5,000 limit. Judge Choy's concurring and dissenting opinion addresses these concerns by concluding that § 441a (a)(1)(C) should be invalidated only to the extent that it applies to unincorporated associations. *CCH* at 50,997, J.S. App. at A-28-A-30.

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[3]The notion that the comprehensive regulatory scheme enacted by the Act would be upset if CMA could provide unlimited cash to CALPAC for use in making contributions to candidates ignores the existence of limits on the contributor-candidate nexus enacted by § 441a(a)(1) and (2) and the limits on combined direct contributory activity by CMA and CALPAC inherent in the "nonproliferation rule" contained in § 441a(a)(5). See dissent, *CCH* at 51,011, J.S. App. at A-69-A-70.

The majority's failure to apply a strict standard of review when addressing the validity of § 441a(a)(1)(C) as applied too CMA's support of CALPAC is an error which deserves full briefing and argument. Majority opinion, *CCH* at 50,900, n. 4, 50,993, J.S. App. at A-7, n. 4, A-15. Contrary to the majority's conclusion, this case directly involves the exercise of first amendment rights. See, Judge Wallace's concurring and dissenting opinion ("dissent"), *CCH* at 51,010, J.S. App. at A-65. The proper approach, in light of the association freedoms infringed by the application of the $5,000 limit to CMA's support of CALPAC, is the strict standard of review. Dissent, *CCH* at 51,005; J.S. App. at A-53. Even if the rational basis test is applied, no sufficient basis exists to regulate CMA's administrative support of CALPAC, since this does not infringe on the contributor-candidate nexus which is separately regulated. Dissent, *CCH* at 51,011; J.S. App. at A-68-A-70.

CONCLUSION

Probable jurisdiction should be noted. In the alternative, this appeal should be set for argument with the question of jurisdiction postponed until argument on the merits.

Respectfully submitted,

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(Appendix E Follows)

Appendix E

United States Court of Appeals

For the Ninth Circuit

No. 79-4426

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants-Appellees.

ORDER

[Filed August 1, 1979]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, Circuit Judge.

The court will hear oral argument in this case on Thursday, October 11, 1979 at 2:30 p.m., in San Francisco, California.

In addition to the questions certified by the United States District Court for the Northern District of California, in its order of July 9, 1979, the parties are requested to address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Appellant will make suitable arrangements for furnishing this court with sixteen (16) copies of the trial court record.

The certificate of record is ordered filed as of August 1, 1979.

Appellant's opening brief is to be filed by August 22, 1979.

Appellee's brief is to be filed by September 12, 1979.

Appellant's reply brief, if any, is to be filed by September 19, 1979.

/s/ James R. Browning
United States Circuit Judge
Chief Judge

Supreme Court, U. S.
FILED
NOV 24 1980
[illegible] JR., CLERK

No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

Whether jurisdiction exists under 2 U.S.C. §437h, including whether the requirements of article III are satisfied and:

1. Whether the pendency of an enforcement action under 2 U.S.C. § 437g, against some of the appellants,* bars jurisdiction under § 437h.

2. Whether 2 U.S.C. § 437h(a) limits the expedited review procedures to questions involving the "facial constitutionality" of the Federal Election Campaign Act.

3. Whether the Court has appellate jurisdiction under 2 U.S.C. § 437h(b) although the court of appeals rendered its decision on questions certified under § 437h(a) while sitting en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, rather than § 437h(a).

Whether the court of appeals correctly answered the certified questions** in the negative, thereby sustaining

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*The parties include appellants, the California Medical Association ("CMA"), a not-for-profit unincorporated association; the California Medical Political Action Committee ("CALPAC"), a political committee sponsored by CMA; and Sidney E. Foster, M.D., and E. Kash Rose, M.D., registered voters and members of CMA and CALPAC. Appellees are the Federal Election Commission ("FEC"); its members at the time this action was commenced, Joan D. Aikens, Robert O. Tiernan, Thomas E. Harris, John McGarry, Vernon E. Thompson, Max Friedersdorf; and its ex-officio members, J. Stanley Kimmit and Edmund L. Henshaw, Jr. Frank R. Reiche replaced Vernon E. Thompson as a member of the FEC after this action was commenced.

**The certified questions are set forth verbatim in the Jurisdictional Statement ("J.S.") at A-82, and in the opinion by the court of appeals, J.S. at A-2, n.1; *Federal Election Campaign Financing Guide* (*CCH*), ¶ 9127 (1980).

the limit on contributions to a political committee established by 2 U.S.C. § 441(a)(1)(C) or:

1. Whether 2 U.S.C. § 441a(a)(1)(C) violates the first amendment on its face, or when applied to limit in-kind contributions of administrative support by an unincorporated association to its political committee.

2. Whether 2 U.S.C. § 441a(a)(1)(C), § 441b(b)(2)(C), § 431(8)(B)(vi), and § 431(9)(B)(v)*** violate the fifth amendment to the extent they limit contributions of administrative support by an unincorporated association to its political committee, when corporations and labor organizations may contribute unlimited amounts of such support to their political committees which operate as separate segregated funds.

***Formerly § 431(e)(5)(F) and § 431(f)(4)(H), *see* n.1, *infra.*

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Note, The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments, 86 Yale L.J. 953 (1977) 23, 24, 26, 27, 28, 30, 32, 34, 39

No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

VS.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

BRIEF OF APPELLANTS

OPINIONS AND ORDERS BELOW

The district court's order certifying constitutional questions to the Ninth Circuit is printed in the Jurisdictional Statement ("J.S.") at A-82. The opinion of the court of appeals, *California Medical Ass'n, et al. v. Federal Election Commission, et al.*, No. 79-4426 (9th Cir. May 23, 1980), is printed in the Jurisdictional Statement at A-1. It is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127 (1980). When this brief was printed the opinion had not been published in the Federal Reporter.[1]

[1]Citations to the opinions by the Court of Appeals will be made to the Jurisdictional Statement ("J.S.") and the *Federal Election Campaign Financing Guide* ("CCH").

JURISDICTION

Jurisdiction is invoked under 2 U.S.C. § 437h. This action was commenced May 7, 1979. Constitutional questions were certified to the Ninth Circuit for hearing en banc pursuant to § 437h(a) by an order filed July 9, 1979. The court of appeals answered those questions in the negative in an opinion filed May 23, 1980. Notice of Appeal was filed June 3, 1980. The appeal was docketed in this Court on June 12, 1980. This Court has jurisdiction pursuant to § 437h(b), which provides:

> *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

STATUTES INVOLVED

This case concerns the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, as amended ("the Act"), and specifically § 431(8)(B)(vi), § 431(9)(B)(v), § 441a(a)(1)(C) and § 441b(b)(2)(C) as well as the first and fifth amendments to the Constitution.[2] The text of the pertinent provisions is set forth in the Jurisdiction Statement at 3-5, in Appendix B to the Jurisdictional Statement at A-74 - A-81, and in Appendix A to the Federal Election Com-

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[2]P.L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263, and the 1976 Amendments, P.L. 94-283, 90 Stat. 475. All citations are to Title 2 of the United States Code, §§ 431-455, except as otherwise noted. After this action was filed the Act was amended by the Federal Election Campaign Act Amendments of 1979, P.L. 96-187, 93 Stat. 1339, effective January 8, 1980. Former §§ 431(e)(5)(F) and 431(f)(4)(H) were renumbered as §§ 431(8)(B)(vi) and 431(9)(B)(v) by the 1979 Amendments.

mission's ("FEC" or "the Commission") Motion to Dismiss the Appeal at 10a-14a.

The jurisdictional provisions of the Act, §§ 437g and 437h, are set out in Appendix A to the FEC's Motion at 1a-9a.[3]

STATEMENT OF THE CASE

On May 7, 1979, appellants filed a complaint for declaratory and injunctive relief, naming the FEC and its members as defendants. (Joint Appendix ("J.A.")4.) Appellants challenged the constitutionality of the provisions of the Act which limit the amount CMA may contribute to CALPAC, and which CALPAC may receive from CMA, to $5,000 per calendar year. In particular, appellants challenged § 441a(a)(1)(C) to the extent it limits support furnished by CMA to CALPAC solely for the purpose of establishing, administering or soliciting contributions to CALPAC. Appellants alleged the offending provisions of the Act violate the first and fifth amendments to the Constitution, and sought declaratory relief and to enjoin enforcement of these provisions against CMA and CALPAC.[4] At a hearing on June 29, 1979 the district court granted appellants' motion to certify constitutional questions to the court of appeals for hearing en banc and denied the FEC's motion to dismiss. An order was entered to that effect July 9, 1979. (J.S. A-82.) The Ninth Circuit directed the parties to address the constitutionality of the provision in 2 U.S.C. § 437h(a) which requires the court of appeals to hear this matter en banc. (J.A. 30.) Oral argument was heard on October 11, 1979. On May 23, 1980, an

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[3] § 437h(a) is also set out at n.9, *infra*.

[4] As to CALPAC appellants sought to enjoin enforcement of § 441a(f), which provides "No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section . . ."

opinion was filed which answered the certified questions in the negative and denied appellants' claims on the merits. (J.S. A-1.) Concurring and dissenting opinions were filed by Judges Choy and Wallace. (J.S. A-29, A-31.) Appellants appealed pursuant to § 437h(b). In an order dated October 6, 1980, the question of jurisdiction was postponed until the hearing on the merits. (J.A. 32.)

CMA is a membership organization which is organized and operates as a not-for-profit, unincorporated association. It established and administers a political committee, known as CALPAC. CMA provides CALPAC with administrative support in the form of goods and services.[5] (J.S. A-82 - A-83; J.A. 23.) CMA is the "connected organization" for CALPAC, as defined by former 11 C.F.R. § 100.15.[6] (J.A. 7.) CALPAC is registered as a "political committee"[7] with the FEC. It operates as a nonpartisan political action committee and receives voluntary contributions intended for use in state and federal campaigns. CALPAC makes contributions from these funds to candidates for federal office and qualifies as a multicandidate

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[5]The reference to "administrative support" as used in this brief refers to expenditures for the "establishment, administration, and solicitation of contributions to" a political committee. § 441b(b)(2)(C). According to 11 C.F.R. § 114.1(b)(1980) this includes the cost of "office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in running a separate segregated fund . . ."

[6]See § 431(7) (1980) and 11 C.F.R. § 100.6 (1980). FEC regulations were revised subsequent to the commencement of this action, 45 Fed. Reg. 15094 (March 7, 1980).

[7]§ 431(4) (1980) defines a political committee to include "any committee . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . ."

[8]Defined in § 441a(a)(4) as "a political committee which has been registered under section 433 for a period of not less than 6 months, which has received contributions from more than 50

political committee under the Act.[8] (J.S. A-83; J.A. 23-24.) Sidney E. Foster, M.D., and E. Kash Rose, M.D., are eligible to vote for the office of President of the United States, and are members of both CMA and CALPAC. (J.S. A-83.) Dr. Foster is CALPAC's treasurer and Dr. Rose has served as an officer of both CMA and CALPAC. (J.A. 25.)

Section 441a(a) (1) (C) limits contributions, defined by § 431(8) (1980), to a political committee to $5,000 per calendar year. Section 441a(a) (1) (C) and § 441a(f) place a $5,000 calendar year limit on contributions a political committee may receive from any person. These provisions limit the contributions CMA may donate to CALPAC, and which CALPAC may receive from CMA, to $5,000 per calendar year. (J.S. A-83; J.A. 26-28.)

Despite the limits imposed by § 441a(a) (1) (C), under § 441b(b) (2) (C), § 431(8) (B) (vi), and § 431(9) (B) (v), corporations and labor organizations may make unlimited contributions of administrative support, as defined in § 441b(b) (2) (C), to their respective political committees which operate as separate segregated funds. These provisions also allow political committees sponsored by a corporation or labor organization which operate as separate segregated funds to receive unlimited contributions of administrative support from the sponsoring corporation or labor organization. (J.S. A-83-A-84; J.A. 26-28.)

Section 441b(b) (2) (C) contains an exemption for support by a "membership organization" for its political committee. As interpreted by the FEC, the exemption applies only to incorporated membership organizations. (J.A. 27.) CMA's contributions to CALPAC of administrative sup-

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persons, and, . . . has made contributions to 5 or more candidates for Federal office." A multicandidate committee may contribute up to $5,000 per candidate per election, § 441a(a)(2)(A). Other contributors are limited to contributions of $1,000 by § 441a(a)(1)(A).

port are therefore limited to $5,000 in value per calendar year solely because CMA is unincorporated. (J.A. 27.)

In October 1978 CMA and CALPAC were advised the FEC had "reason to believe" they had violated the Act because CMA's in-kind contributions to CALPAC had exceeded $5,000 per calendar year contrary to § 441a(a) (1) (C) and § 441a(f). In November 1978 CMA and CALPAC were advised that the Commission had determined there was "reasonable cause" to believe violations had been committed. In April 1979 the Commission determined there was "probable cause" to believe violations had occurred. On May 23, 1979, the FEC filed an enforcement action in the District Court for the Northern District of California alleging, *inter alia,* CMA and CALPAC had violated the Act because of CMA's in-kind support of CALPAC. (J.S. A-84 - A-85; J.A. 28-29.) That action, *Federal Election Commission v. California Medical Ass'n, et al.*, No. 79 1197 WHO, was decided adversely to CMA and CALPAC on June 21, 1980. A copy of the opinion is printed in Appendix F to this brief. CALPAC is continuing to operate as a political committee and is registered with the Commission. (J.A. 23-24.)

SUMMARY OF ARGUMENT

I

Jurisdiction is conferred by § 437h. The mandate in § 437h that the court of appeals sit en banc is not directly at issue, since the court of appeals sat en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. The mandate is constitutional given the Congress' power to determine the jurisdiction of the lower federal courts. CMA and CALPAC have standing, and the case or controversy requirements of article III have been fulfilled, given the pendency of an enforcement action against CMA and CALPAC involving the same provisions at issue here.

Appellants Foster and Rose have statutory standing pursuant to § 437h(a) and have a sufficient personal stake in this matter to satisfy the requirements of article III. The pendency of an enforcement action brought under § 437g does not preempt jurisdiction, particularly since the court of appeals has rendered a decision which has been followed by the district court in the enforcement action. Jurisdiction under § 437h is not limited to the "facial constitutionality" of the Act. Even as limited, jurisdiction exists because the consideration of this matter involves a facial analysis and the disposition by the court of appeals applies generally to any unincorporated association and its political committee. For jurisdictional purposes, it is irrelevant that the court of appeals sat en banc pursuant to Rule 35. Jurisdiction of this appeal is premised on § 437h(b) and a decision by the court of appeals on a matter properly certified pursuant to § 437h(a), not on the rationale used by the court of appeals to sit en banc.

II

The $5,000 calendar year limit on contributions to a political committee established by § 441a(a)(1)(C) violates appellants' first amendment rights, particularly to the extent it limits contributions by an unincorporated association to its political committee made for the purpose of establishing, administering or soliciting contributions to the committee. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and the cases relied on therein reaffirm the protection the first amendment affords the expenditure of money for political activity. An unincorporated association and its political committee are protected by the first amendment when they engage in effective political action. Limits on contributions to a political committee interfere directly with the exercise of first amendment rights and decrease the funds available for political purposes.

The majority below erred in failing to apply a strict standard of scrutiny to the limits on contributions to political committees and by equating contributions to political committees with contributions made to or on behalf of candidates. Contributions to political committees are functionally different from contributions to candidates. Contributions to a committee may fund expenditures and other political activity by the committee, in addition to political contributions. When correctly analyzed, contributions to political committees are more properly compared to independent expenditures. For the same reasons limits on expenditures were invalidated in *Buckley*, a limit on contributions to political committees cannot be sustained.

The need to avoid the actuality or appearance of any quid pro quo arrangements between contributors and candidates justifies limits on contributions to candidates. *Buckley v. Valeo*, 424 U.S. at 26-27. The same rationale cannot be extended to contributions to a political committee. Contributions to a committee do not directly involve the contributor-candidate nexus. Contributions by a committee to a candidate are subject to separate limits. A limit on contributions to committees provides insubstantial protection against corruption, or the appearance of corruption. This is particularly so with respect to contributions of administrative support.

The limit on contributions to political committees is imprecise and overboard. In addition to whatever incidental protection may be provided against corruption, the limit diminishes funds available for political activity. This reduces effective political action and the level of candidate support, and results in a decrease in the quantity of political discussion.

Less drastic legislative means are available to control corruption or the appearance of corruption. The Act con-

tains a variety of anti-evasion provisions which directly and narrowly address potential avoidance of the limits on contributions to candidates. The contribution limits and anti-evasion provisions of § 441a, and the reporting requirements of § 434, provide a comprehensive regulatory scheme and furnish less drastic means to control corruption or the appearance of corruption, rendering § 441a(a)(1)(C) an unnecessary burden on first amendment rights.

III

Section 441b(b)(2)(C) and its definitional counterparts in § 431 provide corporations and labor organizations with an exemption from the limits on contributions to a political committee for contributions made for the purpose of establishing, administering or soliciting contributions to a political committee. These provisions discriminate against unincorporated associations and their political committees in violation of the equal protection component of the due process clause of the fifth amendment.

The limit on administrative supports by an unincorporated association for its political committee is not part of a balanced regulatory scheme. Although corporations and labor organizations may not make direct political contributions or expenditures, § 441b allows corporations or labor organizations several viable avenues to engage in political activity in addition to providing unlimited administrative support for their political committees. Corporations and labor organizations may engage in effective solicitations for their political committees and otherwise influence the political process by communicating with their shareholders and their families and executive or administrative personnel, or their members and families, respectively, without limit. These provisions allow vigorous political activity involving those persons most likely to respond. The concurrent limit on administrative support an unincorporated association may furnish its political committee is not a rational statutory classification.

The limitation on administrative support by an unincorporated association for its political committee interferes with the exercise of first amendment rights. The statutory classification fails to satisfy a compelling governmental interest or the exacting scrutiny required where fundamental rights are infringed.

ARGUMENT

I

JURISDICTION EXISTS UNDER 2 U.S.C. § 437h

A. The Constitutionality of the Requirement the Court Of Appeals Sit En Banc

Given the decision in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam) the validity of § 437h must be assumed except with respect to the requirement the court of appeals sit en banc, an issue not before the Court. The question whether Congress can require the court of appeals to sit en banc pursuant to § 437h(a) is not directly at issue here.[9] The majority avoided the issue, as did the District of Columbia Circuit in *Buckley v. Valeo,* 519 F.2d 821, 902, n.2 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part,* 424 U.S. 1 (1976) (per curiam), by sitting en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, *CMA v. FEC,* J.S. at A-3, A-26, CCH at 50,960, 50,997. Judge

[9] § 437h provides in part:

> (a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Wallace's dissent questions the process of invoking § 437h (a) to confer jurisdiction but relying on Rule 35 to sit en banc. *Id.* at A-34, CCH at 50,999. Because of the inference that § 437h required the court to convene en banc, even though it elected to decide the case under Rule 35, appellants will discuss the validity of the en banc requirement.

En banc proceedings are extraordinary and generally conducted only when a case presents an issue of sufficient concern to enough litigants who may be in similar circumstances. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). In enacting § 437h, Congress implicitly decided that special circumstances exist when a constitutional question is raised with respect to the Act or that such questions are of sufficient concern so as to require authoritative resolution, thus justifying en banc proceedings. Congress has power to create inferior federal courts and to specify their jurisdiction within the confines of article III, *e.g., Palmore v. United States,* 411 U.S. 389, 400-401 (1973), and to direct the Supreme Court to establish rules of practice and procedure, *Sibbach v. Wilson & Co.,* 312 U.S. 1, 9-10 (1941). It follows that Congress has authority to mandate en banc hearings in those cases it deems appropriate. The mandate that the court of appeals sit en banc when ruling on certified questions is constitutional. *CMA v. FEC*, J.S. at A-34, A-41, CCH at 51,002 (Wallace, J., concurring and dissenting) (jurisdiction limited to "facial" constitutionality only.)

Concerns regarding the separation of powers do not support a conclusion that § 437h has disrupted the workings of the coordinate parts of government. The standard of workability, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and questions of "disruption of the balance between the branches . . . ," *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977), would only be relevant with

a showing that courts have become overburdened with cases certified under § 437h. The present action is the first case certified under § 437h in the Ninth Circuit since the statute was enacted in 1974.[10] To date § 437h has rarely been used and hardly poses a threat based on the volume of litigation to the balance between the courts and Congress. Even if the en banc requirement is invalid, it may be severed in the absence of a showing that Congress would not have enacted § 437h but for the en banc requirement. *Buckley v. Valeo,* 424 U.S. at 108-109.

B. The Requirements of Article III Are Satisfied

The standing requirements of article III are satisfied as CMA and CALPAC are directly affected by the offending provisions of the Act, and because they are defendants in a separate action regarding alleged violations of the same provisions at issue here. When this action was filed CMA and CALPAC were closer to actual enforcement proceedings than plaintiffs in *Babbitt v. United Farm Workers National Union,* 442 U.S. 289 (1979). Given the enforcement proceeding, even more than the plaintiffs in *Buckley,* appellants here have a personal stake in the outcome neces-

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[10]Nationwide there appear to be only a handful of certified cases: one in the First Circuit, *John B. Anderson v. FEC,* No. 80-1664 (1st Cir. 1980) (remanded for fact-finding); two in the D.C. Circuit, *Buckley v. Valeo,* and *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977); one in the Seventh Circuit, *Bread Political Action Committee v. FEC,* 591 F.2d 29 (7th Cir. 1979) (en banc hearing ordered); two in the Second Circuit, *FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (questions certified *sua sponte* after they had been raised as a defense, and *Republican Nat. Committee v. FEC,* 616 F.2d 1 (2d Cir. 1979), *aff'd,* 100 S.Ct. 1639 (1980); and one in the Fifth Circuit, *FEC v. Lance,* No. 79-185g (5th Cir. May 5, 1980) (certified *sua sponte*).

sary to meet the requirements of article III. *Buckley v. Valeo*, 424 U.S. at 12, n. 10.[11]

Bread PAC v. FEC, 591 F.2d 29 (7th Cir. 1979) addressed the issue whether a political committee could invoke the expedited review procedures of § 437h. The court concluded that even though trade associations and their political committees were not included in the plaintiffs listed in the first sentence of § 437h(a), they nevertheless had standing to challenge the constitutionality of the Act. *Contra, Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980). The court found § 437h(a) was intended to assure the purpose of "comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act." 591 F.2d at 33. The court recognized:

> . . . The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedures to *apply broadly* to challenges to the Act.

591 F.2d at 31 (Emphasis added). The opinion relies on the acknowledgment in *Buckley* of a sufficient interest by at least some of the plaintiffs so that a "real and substantial controversy admitting of specific relief" was presented and the comment that an organization is permitted to assert personal rights of its membership. 424 U.S. at 12, n.10. *See Let's Help Florida v. Smathers*, 453 F.Supp. 1003 (N.D.

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[11]Plaintiffs in *Buckley* included a candidate for the presidency, a U.S. Senator, a potential contributor, several political parties, a political committee, and various interest groups. When the action was filed, one day after the effective date of the 1974 Amendments, none of the parties was a defendant in an enforcement action. *See generally* Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Governmental Restraints on Political Campaign Financing*, 29 Vand. L. Rev. 1327, 1328, n.2 (1976).

Fla. 1978), *aff'd sub nom., Let's Help Florida v. McCrary,* 621 F.2d 195 (5th Cir. 1980).

Appellants Foster and Rose clearly fall within the plaintiffs listed in the statute. By including a reference to "any individual eligible to vote in any election for the office of president" Congress determined voters should have access to a forum to test the constitutionality of the Act. Beyond their interest as individual voters, Foster and Rose also are members of CMA and CALPAC, and have more than a generalized interest in the case. Section 441a(a)(1)(C) limits their contributions to political committees and their rights of association with other members of CMA and CALPAC for the purpose of engaging in effective political action. They have the requisite personal stake in this case to satisfy article III because of the impact the offending provisions of the Act have on their first amendment rights. *CMA v. FEC,* J.S. at A-45, A-46; CCH at 51,003 (Wallace, J., concurring and dissenting).

In *Flast v. Cohen,* 392 U.S. 83 (1968) the Court held plaintiff taxpayers had standing to challenge the expenditure of federal funds as violating the establishment of religion clause of the first amendment because of the general impact on the public, rather than as a result of the utilization of funds contributed by those particular taxpayers. Where the first amendment is involved, standing should be conferred more liberally. *See Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). The decision in *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972) is instructive. There the Court gave vitality to the Civil Rights Act with a broad construction of standing, emphasizing the adversary context of the dispute and the absence of "abstract question-raising problems." 409 U.S. at 211.

Given the enforcement action, the case or controversy requirement is satisfied. This case is not a situation where a litigant "seeks to employ a federal court as a forum in which to air his general grievances about the conduct of government or the allocation of power in the federal system." *Flast v. Cohen,* 392 U.S. at 106. It is easily distinguished from *Gifford v. Congress,* 452 F.Supp. 802, 806 (E.D. Cal. 1978), where the court dismissed the complaint because "the extraordinary procedure set up in § 437h should not be utilized when the constitutional claim is frivolous." *Clark v. Valeo,* and *Martin Tractor Co. v. FEC,* are inapposite as those cases turned on the absence of a controversy ripe for decision. *Mott v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9134 (D.C.D.C. 1980), also involved ripeness considerations and the district court's conclusion that the constitutional issues had previously been decided.

C. Pendency of an Enforcement Action Under § 437g Does Not Bar Jurisdiction Under § 437h

Nothing in the statutory scheme mandates a finding that the pendency of an enforcement action forecloses certification under § 437h. To the contrary, § 437g and § 437h are separate parts of the statutory scheme and serve distinct purposes. As noted in *Bread PAC v. FEC,* 591 F.2d at 32-33, under § 437g(a)(10)(1980)[12] an enforcement action must be advanced on the docket ahead of all other cases, *except those filed under § 437h.* Thus, while § 437g provides an alternative method to obtain judicial review for some litigants, it does not foreclose a proceeding under § 437h. Instead, constitutional questions are entitled to "receive the even more expedited review" required by § 437g(a)(10) and unlike an enforcement action may be taken to the Supreme Court by direct appeal. *Id.* at 33.

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[12]Formerly § 437g(a)(11).

Section 437h was designed to allow for the expeditious review, including ultimate review by the Supreme Court, of constitutional challenges to the Act which satisfy the requirements of article III. A premium is placed on expeditious review. *Clark v. Valeo,* 559 F.2d at 661 (Lowenthal, J., concurring). The en banc requirement, the grant of standing in § 437h(a), and the command that such cases be expedited demonstrate Congress' intent that challenges be resolved promptly and authoritatively. This rationale would be disrupted if expedited review could be stalled or barred altogether by an enforcement proceeding. If an action under § 437g superseded an action under § 437h, it would be possible for the Commission to wait until a § 437h case had been filed and questions certified, then file an enforcement action thereby depriving litigants of the special expedited review procedures. This would encourage forum-shopping and dilatory tactics by the FEC, and does not conform with the goal of speedy review of constitutional questions. *See Bread PAC v. FEC,* 591 F.2d at 33; *Clark v. Valeo,* 559 F.2d at 661 (Lowenthal, J., concurring).

Deferring to an enforcement proceeding leads to a circular result. In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee ("CLITRIM"),* 616 F.2d 45 (2d Cir. 1980) (en banc), the district court relied on § 437h to certify *sua sponte* constitutional questions raised in defense. This leads to the anomaly of a proceeding under § 437h being superseded by a proceeding under § 437g, only to see the special review provisions of § 437h ultimately invoked in the enforcement action. If fact-finding is undertaken in a § 437h proceeding, *e.g., Buckley v. Valeo,* 424 U.S. at 9-10; *Clark v. Valeo,* 559 F.2d at 645, n.2, and an enforcement action is pending, fact-finding could conceivably be consolidated without interfering with the mandate of § 437h.

Preemption by the enforcement action makes no sense in this proceeding. The district court has adherred to the Ninth Circuit's opinion on the constitutional questions. Nothing would be served to now defer ruling on the merits in favor of further proceedings in the enforcement proceeding which would in any event be a foregone conclusion insofar as constitutional questions are concerned given the Ninth Circuit's opinion. Thus, even if as a general rule it is determined that an enforcement proceeding preempts an action brought under § 437h, the application of that rule here serves no purpose.

D. This Appeal Presents Questions Regarding the "Facial" Constitutionality of the Act. Jurisdiction Exists Even if § 437h is Narrowly Construed to Apply Only to Such Questions

The notion § 437h limits jurisdiction to challenges of the "facial constitutionality" of the Act was rejected by seven members of the court of appeals. *CMA v. FEC,* J.S. at A-25, CCH at 50,996; *contra,* J.S. at A-34-A-41, CCH at 50,999-51,001 (Wallace, J., concurring and dissenting). The question of whether a particular challenge to the Act is directed solely to the facial provisions of the Act is imprecise and an improper standard to apply. *Id.* The appropriate test is whether or not the case satisfies the basic requirements of article III. *See Buckley v. Valeo,* 424 U.S. at 11-12; *Bread PAC v. FEC,* 591 F.2d at 33-35.

It is basic that a court first construe a statute to avoid addressing constitutional questions whenever possible. *Crowell v. Benson,* 285 U.S. 22, 62 (1932). In *Buckley,* the Court construed and interpreted the expenditure ceiling in 18 U.S.C. § 608(e)(1), 424 U.S. at 40-45. Construction or interpretation of a statute does not foreclose jurisdiction under § 437h. *CMA v. FEC,* J.S. at A-48, n.15, CCH at 51,004 (Wallace, J., concurring and dissenting). If the court

needs additional facts it can remand to allow fact-finding by the district court. *Buckley v. Valeo*, 424 U.S. at 7-10; *Clark v. Valeo*, 559 F.2d at 661; *Bread PAC v. FEC*, 591 F.2d at 36. Thus, even if the scope of § 437h is limited to the facial validity of the Act, construction of the relevant statutes and fact-finding to frame the issues are appropriate and do not of themselves defeat jurisdiction.

Appellants have challenged the offending provisions of the Act on their face. The majority's analysis was limited to the Act on its face, and the opinion applies equally to any unincorporated association that sponsors a political committee. The opinion does not turn on facts peculiar to CMA or CALPAC. As pointed out by Judge Choy, both concurring and dissenting opinions apply equally to all unincorporated associations without reliance on specific factual circumstances. *CMA v. FEC*, J.S. at A-29, CCH at 50,997 (Choy, J., concurring and dissenting). The same is true of the majority opinion. Even if the expedited en banc procedure mandated by § 437h is limited to questions of the facial constitutionality of the Act, the certified questions have been addressed in those terms and jurisdiction exists.

E. It Is Irrelevant the Court of Appeals Sat En Banc Pursuant to Rule 35 Rather Than § 437h

This appeal is brought pursuant to section 437h(b), which provides in pertinent part:

> . . . any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States . . .

Once the court of appeals has decided a matter properly certified under subsection (a) the right of appeal to this Court lies. Nothing in § 437h(b) requires the court of appeals to sit en banc pursuant to § 437h(a) as a prerequisite

for this Court's jurisdiction. Clearly this was not required in *Buckley* where the court of appeals sat en banc pursuant to Rule 35. *Buckley v. Valeo,* 519 F.2d at 902, n.2. Jurisdiction there was premised on certification by the district court to the court of appeals pursuant to § 437h(a), and a decision by the court of appeals on the certified questions. This Court's appellate jurisdiction under § 437h(b) should not be confused with the jurisdiction of the court of appeals to render a decision on questions certified under § 437h(a), and the concurrent mandate of § 437h(a) that the courts of appeals sit en banc.

Here, the court of appeals invoked Rule 35 to hear the matter en banc.[13] Taking its cue from the Second Circuit, the majority avoided what might be "delicate questions," noting the importance of the case warranted an en banc hearing pursuant to Rule 35. *CMA v. FEC*, J.S. at A-26, CCH at 50,997, *citing Buckley v. Valeo*, 519 F.2d at 902, n.2. Jurisdiction does not depend on why the court of appeals sat en banc, but only on the fact that a decision was entered on a matter properly certified pursuant to § 437h(a). Since the court of appeals rendered a decision on a matter properly certified pursuant to §437h(a), jurisdiction under §437h(b) exists.

II

THE LIMIT IMPOSED BY § 441a(a)(1)(C) ON CONTRIBUTIONS BY AN UNINCORPORATED ASSOCIATION TO ITS POLITICAL COMMITTEE VIOLATES THE FIRST AMENDMENT

Appellants challenge the $5,000 calendar year limit on contributions to a political committee imposed by § 441a (a)(1)(C) for the narrow purpose of obtaining a decision

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[13]The court of appeals had requested the parties to address the constitutionality of the requirement that it sit en banc. Order by Chief Judge Browning filed August 1, 1979, J.A. 30.

that allows an unincorporated association to provide unlimited support for its political committee where that support is solely for the purpose of establishing, administering, or soliciting contributions to the committee. While arguments made in support of this challenge may sustain the invalidation of §441a(a)(1)(C) in its entirety, appellants' concerns are more narrowly circumscribed. Thus, appellants will primarily address the question of limits on "administrative support" for a political committee.

By providing administrative support for CALPAC, CMA allows CALPAC to use all of the voluntary contributions which CALPAC receives for the purpose of making contributions to candidates for public office or for other political activity, including independent expenditures. This mechanism is typical of the approach by political action committees and their sponsors.[14] Costs inherent in the establishment and administration of CALPAC, and in the solicitation of contributions to CALPAC, are absorbed by CMA. This subsidization permits CALPAC to use all funds received as voluntary contributions to make contributions to candidates for public office or engage in other political activity. A limit on CMA's administrative support of CALPAC directly affects the funds available to make contributions to candidates or engage in other political activity, since CALPAC is obliged to pay costs of administration and solicitation directly from the voluntary contributions it receives.

The limits established by §441a(a)(1)(C) must be evaluated in light of the Court's landmark decision on campaign finance regulation, *Buckley v. Valeo,* 424 U.S. 1

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[14]*See Pipefitters Local 562 v. United States,* 407 U.S. 385, 393, 401-432 (1972) (political action by union); FEC Advisory Opinion 1975-23 (Sun Oil), 40 Fed. Reg. 56584, CCH ¶5151, (political action by a corporation).

(1976) (per curiam). Limits on contribution and expenditures operate in the area of "the most fundamental First Amendment activities." 424 U.S. at 14. The protection afforded by the first amendment extends to freedom of association as well as the exercise of political speech and public debate. 424 U.S. at 15, 25, 58-59, *citing, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) and *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). Analysis of the nature of contributions to political committees in light of *Buckley* shows that the $5,000 calendar year limit on contributions to a political committee is unconstitutional, particularly when applied to limit administrative support an unincorporated association may provide its political committee.

A. Limits on Contributions to a Political Committee Infringe First Amendment Rights and Cannot Be Sustained By the Rationale That Justifies Limits on Contributions to Candidates

In *Buckley v. Valeo* limits on expenditures by candidates in federal elections, and independent expenditures by others, were held unconstitutional, 424 U.S. at 39-51, but limits on contributions to candidates were sustained because of the need to prevent corruption or the appearance of corruption, 424 U.S. at 26-28. Congress responded with the 1976 Amendments.[15] Limits on contributions now appear in § 441a. A multicandidate political committee may contribute up to $5,000 per candidate per election under § 441a(a) (2) (A). Other "persons" are limited by § 441a (a) (1) (A) to contributions of $1,000 to any candidate, or a candidate's authorized committee, per election. Section 441a includes provisions designed to prevent circumven-

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[15]The 1976 Amendments were the direct result of the sweeping ruling in *Buckley*. *See, e.g., Clagett and Bolton, supra*, n.11; Senate Report No. 94-677, printed at 2 U.S. Code Cong. & Adm. News, 929-946 (1976).

tion of the limits on contributions.[16] Also, for the first time a limit was placed on contributions to political committees, defined in § 431(4) (1980) as any group of persons which receives contributions or makes expenditures during a calendar year in excess of $1,000. Under § 441a(a)(1)(C) no person may contribute more than $5,000 per year to a political committee.

No operative distinction is made in the Act between contributions given to a candidate, or a candidate's authorized committee, and contributions given to other political committees which support a number of candidates and which may engage in other political activity. The Act also does not distinguish contributions to a committee of money from in-kind contributions of administrative support.[17] Administrative support to a political committee by its sponsoring organization is limited in the same manner as a contribution to a candidate, or the candidate's authorized committee.[18] The majority below makes a similar error in sustaining § 441a(a)(1)(C) without acknowledging the functional difference between contributions to candidates and support for a political committee. *CMA v. FEC*, J.A. at A-6-A-18, CCH at 50,990-50,994.

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[16] *E.g.*, § 441a(a)(7)(B)(i) treats expenditures made in cooperation with a candidate as contributions. Section 441a(a)(8) prevents avoidance of contribution limits by earmarking contributions for a candidate. *See* 11 C.F.R. § 110.6.

[17] According to 11 C.F.R. § 100.7(a)(1)(iii)(1980) the definition of contribution encompasses "anything of value" including in-kind contributions.

[18] Contribution is defined in § 431(8)(A), formerly § 431(e), to include anything of value given to a political committee. 11 CFR § 100.7a(a)(1)(iii). Problems of vagueness and the chilling effect of this definition are discussed below. *See Buckley v. Valeo*, 424 U.S. at 40-45.

The absence of any distinction between the regulation of contributions to candidates or their authorized committees, and contributions to a political committee, particularly contributions of administrative support for a multicandidate committee, is constitutionally defective under *Buckley*. Contributions to a political committee are functionally distinct from contributions to a candidate. As noted by Judge Wallace in dissent:

> Section 441a(a) (1) (C), in contrast, regulates an entirely different relationship: that of donor ('person') to committee. The purposes behind the contribution limits approved in *Buckley* and the donation restriction in section 441a(a)(1)(C) are necessarily distinguishable because a different relationship is being regulated. The majority simply ignores these differences which distinguish our case from *Buckley*.

CMA v. FEC, J.S. at A-69, CCH at 51,011; *see Buckley v. Valeo*, 424 U.S. at 244 (Burger, C.J., concurring and dissenting). The rationale used in *Buckley* to sustain a limit on contributions to candidates, the prevention of corruption or the appearance of corruption, 424 U.S. at 26-28, cannot be applied to sustain a limit on support for political committees. *CMA v. FEC*, J.S. at A-63-A-64, CCH at 51,009 (Wallace, J., concurring and dissenting); *see Common Cause v. Schmitt*, No. CA 80-1609, *FEC v. Americans For Change*, No. CA 80-1754 (D.C.D.C. Sept. 30, 1980) (three-judge court) (consolidated opinion), slip op. at 17-19, Appendix G at A-37 - A-39. This is so because of the functional affinity of contributions to a political committee and independent expenditures.[19] It is for the same reasons

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[19]*See* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 Yale L.J. 953 (1977). The author provides a detailed analysis of *Buckley* and distinguishes contributions to candidates from contributions to political committees. Contributions

the anti-corruption rationale failed to justify regulation of independent expenditures that a limit on contributions to political committees cannot be sustained.

The considerations which caused the Court in *Buckley* to distinguish independent expenditures from direct contributions and invalidate limits on independent expenditures apply to § 441a(a) (1) (C), and in particular to the limitation of administrative support by an unincorporated association for its political committee. Contributions and independent expenditures constitute forms of protected speech. *Buckley v. Valeo,* 424 U.S. at 19-23. Both also constitute forms of political association. *Id.* at 22. The Court found fundamental differences between contributions and independent expenditures and held that contributions to candidates are akin to vicarious speech. Limits on contributions to candidates allow symbolic expression by contributors in the form of a limited contribution but do not infringe on discussion of issues by the contributor. *Id.* at 21. Limits on independent expenditures unduly infringe freedom of speech and of association and were therefore held unconstitutional.[20] *Id.* at 22.

In analyzing the rights of contributors and persons making independent expenditures, the Court emphasized the right to associate and stated that a limit on expenditures:

> . . . precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. *NAACP v. Alabama,* . . . The Act's constraints on the ability of *independent associations* and campaign organizations to expend re-

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to political committees are placed in a "third classification" called donations and are distinguished from contributions to candidates or independent expenditures. *Id.* at 957-961.

[20] *Id.* at 955-956.

> sources on political expression "is simultaneously an interference with the freedom of [their] adherents." *Sweezy v. New Hampshire.* . . . (Emphasis added.)

424 U.S. at 22.[21] The opinion also relies on *NAACP v. Alabama,* 357 U.S. 449 (1958), for the proposition that an individual has a first amendment right to *effective* speech through participation in an effective political organization, a conclusion sustained in, *e.g., Kusper v. Pontikes.* 414 U.S. 51 (1973); *NAACP v. Button,* 371 U.S. 415 (1960); and *Bates v. City of Little Rock,* 361 U.S. 516 (1960).[22] For example, in *Griswold v. Connecticut,* 381 U.S. 479 (1965) the Court stated:

> . . . the right of 'association,' like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or affiliation with it or by other lawful means. *Association in that context is a form of expression of opinion.* . . .

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[21]In *Sweezy v. New Hampshire,* 354, U.S. 234, 250 (1957), the Court stated: "Our form of government is built on the premise that every citizen will have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political association."

[22]The importance of association for political purposes is emphasized by the increased participation of political action committees ("PAC's") in federal campaigns. Both the number of PAC's and the amounts contributed to candidates for the House and Senate increased dramatically in the 1970's. Epstein, *The PAC Phenomenon: An Overview,* 22 Ariz. L. Rev. 355, n.1, 356-357 (1980); Sorauf, *Political Parties and Political Action Committees: Two Life Cycles,* 22 Ariz. L. Rev. 445, 451-452 (1980); Adamany, *PAC's and the Democratic Financing of Politics,* 22 Ariz. L. Rev. 569, 588-585 (1980). There was a substantial increase in the number of PAC's filing reports between 1974 and 1978, with total PAC expenditures rising from $36.9 million in 1976 to $77.8 million in 1978. At the same time contributions by PAC's to candidates increased from $20.5 million to $35.1 million. Adamany, 22 Ariz. L. Rev. at 588.

381 U.S. at 483 (Emphasis added). Thus, a political committee is merely a "medium through which its individual members seek to make more effective the expression of their own views." *NAACP v. Alabama,* 357 U.S. at 459.[23]

The Court held expenditure limits violated the first amendment, 424 U.S. at 39-51, acknowledging the vital role money plays in exercising these rights as follows:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . .
>
> The expenditure limitation contained in the Act presents substantial rather than merely theoretical restraints on the quantity and diversity of political speech.

Id. at 19.[24] Association may conceivably be the only means for certain persons to participate effectively in the political process. With the existing reliance on mass media in

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[23]Note, *supra* n.19 at 958-959. The author notes that the collective expression of a political committee is the extension of the individual speech of its members. *See Common Cause v. Schmitt,* slip op. at 14-15, Exhibit G at A-34 - A-35.

[24]*See United States v. Auto Workers,* 352 U.S. 567, 594 (1957) (Douglas, J., dissenting); *Stoner v. Fortson,* 379 F.Supp. 704, 711 (N.D. Ga. 1974), where the court stated:

> "There can be little doubt that this right of freedom of association extends to the right of individuals to participate in political activity . . . membership in and of itself was not the crucial point, but rather the fact that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."

political campaigns, a collective voice may be essential.[25] *Id.* at 19. Collective political action is more feasible and influential than individual activity or autonomous speech. In light of the Act's limitation on individual contributions to candidates, contributions to a political committee may be the only effective way to participate in the electoral process. *See Common Cause v. Schmitt*, slip. op. at 14, Exhibit G at A-33. This fact was recognized in a recent study that notes the increased participation by political action committees and the effects of inflation.[26] Another example is *Pollard v. Roberts*, 283 F.Supp. 248 (E. D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968) where the court found an attempt to compel disclosure of a list of contributors violated the first amendment rights of the members of a political party, stating:[27]

> For better or for worse, the only means, apart from voting, whereby most people can participate effectively in politics is to affiliate themselves with a political party and to make financial contributions thereto, according to their respective means and inclinations. To

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Thus, the right to join together to support or advance particular beliefs and ideas should be protected by this principle, whether it be by membership in an organization furthering those beliefs or through contributions to a campaign. . . . Either way individuals are attempting to further their views and beliefs . . ."

[25]Note, *supra* n.19 at 959-960. The Court also noted the skyrocketing costs of political campaigns, 424 U.S. at 26.

[26]Institute of Politics, John F. Kennedy School of Government, Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act*, 1972-78, prepared for the House Comm. on House Admin., 96th Cong., 1st Sess. (Comm. Print 1979) ("*FECA Impact Analysis*"). This study notes the increasing role of political action committees and recommends, *inter alia*, an increase in the individual contribution limit to $3,000. *Id.* at 2, 6-8. *See Epstein, Sorauf,* and *Alamany, supra,* n.22.

[27]Note, *supra* n.19 at 960.

> the extent that a public agency or officer unreasonably inhibits or discourages the exercise by individuals of their right to associate with others of the same political persuasion in the advocacy of principles and candidates . . . and to support those principles and candidates with their money . . . that agency or officer violates private rights protected by the First Amendment.

283 F.Supp. at 258.

Associations such as CMA and CALPAC are protected by the first amendment. *Buckley v. Valeo*, 424 U.S. at 58-59; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Under *Buckley* members of CMA and CALPAC have the right to associate in an effective manner for political purposes. When CMA provides goods and services for CALPAC, it exercises its rights and its members' rights under the first amendment. Limits on CMA's support directly infringe those rights, in particular the right to function effectively through the medium of a political committee.

As the analysis that follows will show, § 441a(a)(1)(C) unnecessarily infringes appellants' first amendment rights, particularly when the analysis focuses on administrative support. Support of a political committee permits effective association for political purposes through the committee. Administrative support should not be categorized with contributions to candidates or automatically labelled as a contribution.[28] The contributor-candidate nexus regulated by the limit on contributions is distinct from the relationship between political committees and their sponsors. Limits on administrative support not only reduce the committee's ability to make contributions, which are separately regulated by the Act, but they also reduce the committee's

[28]Note, *supra* n.19 at 962. The author concludes limits on contributions to political committees are invalid and distinguishes them from contributions and expenditures addressed in *Buckley*. *Id.* at 957-961, 973.

ability to make independent expenditures. The limit on support for political committees has the same ultimate effect that the Court in *Buckley* found objectionable, the restriction of political speech and the reduction of public discussion of the issues. *Buckley v. Valeo*, 424 U.S. at 17-19; *id.* at 241-243 (Burger, C.J., concurring and dissenting); *see, e.g., Mills v. Alabama*, 384 U.S. 214 (1966).

B. The Limit on Administrative Support Set By § 441a (a)(1)(C) Is Unconstitutional Under the Strict Standards of Review Used in Buckley v. Valeo

In analyzing the limitations on contributions and independent expenditures, the Court in *Buckley* found that the restrictions were subject to "the closest scrutiny" and that their constitutionality depended on whether the government's interest in the restrictions was sufficient to ". . . satisfy the exacting scrutiny applicable to limitations on core first amendment rights of political expression." *Buckley v. Valeo*, 424 U.S., at 25, 44-45; *see, Elrod v. Burns*, 427 U.S. 347, 362 (1976).[29] The Court rejected a conclusion by the court of appeals that the Act involved the regulation of conduct rather than speech.[30] Instead of the standard used in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court found that the regulation of contributions and expenditures involved speech rather than conduct. 424 U.S. at 16-17. Therefore, a strict standard of review was applied. *Id.* at 16, 65, n.76. The Court used a three-tier test and asked (1) whether substantial governmental interests existed to justify regulation; (2) whether the regulatory provisions directly and narrowly served these interests; and (3) whether the government's objectives could be achieved by other means that infringed less on

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[29] *Id.* at 961.

[30] *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc).

first amendment activity.[31] As demonstrated below, the $5,000 calendar year limit on administrative support fails these tests.

1. No Governmental Interest Justifies a Limit on Administrative Support for a Political Committee

The primary purpose of the Act is to limit the actuality and appearance of any "quid pro quo" arrangements between a contributor and a candidate. *Buckley v. Valeo,* 424 U.S. at 26-27. A candidate's dependence upon the support of contributors undermines the integrity of the electoral process, and the appearance of corruption created by public awareness of the opportunities for abuse would erode confidence in the electoral process.[32] *Id.* at 25-28. In finding limitations on contributions to candidates were directly and narrowly related to legitimate ends, the Court stated the restrictions focused "precisely upon the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified . . ." *Id.* at 28. The Court also found an absence of any less intrusive alternative means to achieve the legitimate governmental purpose of mitigating the potential for "quid pro quo" corruption and of reducing the appearance of corruption. *Id.* at 27-28.[33]

Limits on independent expenditures could not be sustained. No substantial governmental interest justified the burden placed on first amendment rights. Unrestricted in-

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[31]Note, *supra* n.19 at 962; Comment, *Buckley v. Valeo, The Supreme Court and Federal Campaign Reform,* 76 Col. L. Rev. 852, 861 (1976). The question of precisely what standard the Court applied is in dispute. Judge Wallace found that the decision began with "strict scrutiny," but then evolved into a balancing test. *CMA v. FEC,* J.S. at A-61, n.23, CCH at 51,008 (concurring and dissenting opinion).

[32]Note, *supra* n.19 at 962.

[33]*Id.* at 963.

dependent advocacy limited by former 18 U.S.C. 608(e)(1) did not pose dangers either real or apparent of corruption.[34] *Id.* at 46. Independent advocacy and the interest in uninhibited speech protected by the first amendment could be protected if expenditure limitations were invalidated without jeopardizing valid interests underlying the Act. *Id.* at 49. Limits on independent expenditures were overbroad and had to be narrowly interpreted to avoid unconstitutional vagueness. *Id.* at 45-46, n.53. The Court found the restriction on truly independent activity had little corruptive potential. By their very independence the expenditures subject to the limitation ". . . may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[35] *Id.* at 47. The Court stated:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that the expenditures will be given as *quid pro quo* for improper commitments from the candidate.

Id. at 47.[36]

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[34]*Id.*

[35]*Id.* at 964. It is interesting to note the reluctance of political action committees to make independent expenditures. See *FECA Impact Analysis, supra* n.26 at 111-112. Such expenditures may not always be in the candidate's best interest. *See Common Cause v. Schmitt,* slip op. at 16, Exhibit 9 at A-36.

[36]The limit on independent expenditures was also found to be unconstitutionally underinclusive. Narrowly construing the definition of independent expenditures to avoid unconstitutional vagueness, the Court found the provisions could only apply to expenditures expressly advocating the election or defeat of a clearly identified candidate. As redefined, the limitation on expenditures would not apply to advocacy in more general terms and did not rationally relate to the intended purpose because:

> . . . no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend

The $5,000 calendar year limit on the amount CMA may contribute as administrative support to CALPAC infringes first amendment rights. Like the limit on independent expenditures, it is unrelated to a valid governmental purpose. *CMA v. FEC,* J.S. at A-62-A-72, CCH at 51,009-51,012 (Wallace, J., concurring and dissenting). The limit does not control the amounts contributed to an individual candidate. Administrative support merely enhances the committee's ability to engage in political activity, including but not necessarily limited to making contributions to candidates. Contributions by political committees to candidates are already subject to either the $1,000 or $5,000 limit of § 441a(a)(1)(A) or § 441a(a)(2)(A). The majority below failed to fully appreciate the impact these limits and the anti-evasion provisions of §§441a(a)(7) and (8) have on potential abuse. In comparison to the other limits which operate directly on the contributor-candidate nexus, the limit on support for a committee fails to provide direct protection against the quid pro quo corruption which the Act was designed to preclude. While it may be argued that a limit on monetary contributions to a political committee is a necessary feature of the anti-evasion provisions of § 441a, as applied to limit administrative support § 441a(a)(1)(C) fails the initial test applied in *Buckley.* It serves no function reasonably related to valid purposes of the Act.

2. Section 441a(a)(1)(C) Is Overbroad

If the government's legitimate purposes can be served by less drastic means, which are less intrusive of first amendment rights, the statute cannot stand. *E.g., Elrod v. Burns,* 427 U.S. at 363; *United States v. Robel,* 389 U.S. 258, 268 (1967); *Shelton v. Tucker,* 364 U.S. 469, 488 (1960). In

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unlimited amounts of money in order to obtain improper influence over candidates for elective office.

424 U.S. at 45. Note, *supra* n.19 at 964-965.

Buckley the Court found limits on independent expenditures failed to focus directly and narrowly on a valid governmental interest. Likewise, § 441a(a)(1)(C) does not meet the requirement that a statute regulating first amendment activity be narrowly tailored to achieve the government's legitimate ends. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 100 S.Ct. 2326 (1980).

Section 441a(a) (1) (C) is overinclusive as a means of preventing actual or apparent corruption because it regulates the relationship between a multicandidate political committee and its donors, as distinguished from the relationship between contributors and candidates or their authorized committees. The government's interest in stemming corruption, or the appearance of corruption, depends instead on the regulation of the eventual use of funds by the political committee. Regulation of administrative support has at best a marginal bearing on the use of those funds in campaigns. Instead, it is the potential for corruptive influence resulting from contributions made by a political committee to candidates which is properly regulated under *Buckley.* In regulating the relationship of donor to committee, § 441a(a) (1) (C) deals with transactions one step removed from direct contributory activity. In the process first amendment activity protected under *Buckley* is burdened beyond the degree necessary to further the government's interest. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 100 St.Ct. 2343 (1980).

Political committees are already subject to a wide range of limitations on contributions, including various reporting requirements.[37] Even if CMA could provide un-

[37]Committees must register pursuant to § 433. Periodic reports of contributions and expenditures are required by § 434. Contributions are not only limited in amount but under §§ 441a(a)(7)

limited support to CALPAC, the potential for corruption from this support is subject to existing limits on contributions by CALPAC to candidates for federal office. As far as preventing the appearance of corruption, it would be impossible for recipients of contributions from CALPAC to determine with certainty the source of a particular contribution whether an individual, the CMA or another donor. A multicandidate political committee insulates donors from actual or apparent quid pro quo arrangements with candidates.[38] These committees stand between candidates and the original source of contributions. The political committee is, of course, subject to the limits on contributions to candidates in §§ 441a(a)(1)(A) and (2)(A) and no matter how much the committee has on hand to contribute the ability to contribute to individual races is restricted. To the extent a committee must pay its own operating expenses, rather than receive support from its sponsor, the total amount available for making contributions is diminished. The ultimate purpose of the Act is not to limit the total amount which a committee may spend on political action, but rather to prevent corruption in individual campaigns. Limits which in effect diminish the total amounts available to the committee for use as contributions or expenditures sweep too broadly and reduce the overall level of first amendment activity, contrary to the basic purpose of the first amendment that political debate be robust and wide-open, *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Like other political committees, CALPAC may make independent expenditures as well as direct contributions to candidates. To the extent it makes independent expenditures CALPAC engages in first amendment activity that

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and (8) expenditures which are coordinated with a candidate, and earmarked contributions are treated as contributions for purposes of the limits set by §§ 441a(a)(1) and (2).

[38]Note, *supra* n.19 at 967-968.

cannot be limited given the result in *Buckley*. If funds available for use as independent expenditures must be used to defray operating costs because of the limit on CMA's administrative support, the level of expenditures will suffer a resultant decrease. Judge Wallace observed:

> A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the section 441a(a)(1)(C) donation restriction to the contribution limitation upheld in *Buckley*.

J.S. at A-63, CCH at 51,009 (concurring and dissenting opinion.) Judge Wallace concluded that § 441a(a)(1)(C) is invalid since the speech interests being regulated are comparable with the expenditure limits invalidated by *Buckley*. J.S. at A-64, CCH at 51,009. Thus, a limitation on support for a political committee sweeps too broadly by inhibiting expenditures protected under *Buckley*. *But see Mott v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9134 (D.C.D.C. 1980), *appeal docketed*, No. 80-1945 (D.C. Cir. Aug. 12, 1930), where the court sustained § 441a(a)(1)(C) as applied to limit contributions to a committee earmarked for use as independent expenditures.

The overbreadth of § 441a(a)(1)(C) not only limits the committee's ability to make independent expenditures, but also infringes on associational rights. Without support from a sponsoring organization that can be used to underwrite the committee's operating expenses, donors may be reluctant to contribute to the committee because such contributions will be used for operating costs rather than direct political activity. Judge Wallace's dissent noted the costs inherent in operating a committee and the con-

comitant disincentive for contributors to donate, thus inhibiting the committee's ability to operate effectively. *CMA v. FEC,* J.S. at A-65, CCH at 51,009-51,010.

Section 441a(a)(1)(C) lacks the extreme precision and specificity required when first amendment rights are regulated. The classic statement appears in *NAACP v. Button,* 371 U.S. 415, 432-433 (1963):[39]

> [S]tandards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate only with narrow specificity.

The limits set by § 441a(a)(1)(C) require a determination of the precise meaning of the definition of "contributions" contained in § 431(4) in the context of support furnished to a committee.[40] In-kind contributions of administrative support may be difficult to value. It is also difficult to determine what contributions of administrative support are to be considered payments "made for the purpose of influencing" a federal election within the meaning of former § 431(e)(1) or current § 431(8)(A). *See Buckley v. Valeo,* 424 U.S. at 41-44, n.52, where the Court narrowly construed limits on independent expenditures in an attempt to preserve the statute. There are also likely to be problems

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[39]Likewise in *Buckley* the Court stated:

> Vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Citations omitted.)

424 U.S. at 41, n.48.

[40]The district court's opinion in *FEC v. CMA,* while providing some guidance, does not delineate precisely what administrative support constitutes a contribution when the committee engages in political activity in addition to direct contributions. Slip op. at 4-11, Appendix F at A-5 - A-16.

with allocation and accounting.[41] Given the vagueness of the Act and FEC regulations, and the Commission's unpredictable interpretations of both,[42] it is difficult to see how the limit on administrative support could do anything except chill federal election activities by an unincorporated association and its political committee.[43] The overbreadth of § 441a(a)(1)(C) has the net effect of curtailing CALPAC's willingness to participate in federal campaigns.

Despite the majority's assertion that § 441a(a)(1)(C) is closely tailored to achieve legitimate ends, the statute is overbroad and fails the test of directly and narrowly serving the intended purpose of the Act, particularly where administrative support is concerned.

3. Less Intrusive Means Already Regulate Political Committees

In *Buckley* the Court also asked whether less intrusive alternative means could have been used to achieve legitimate objectives. This is necessary because:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental per-

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[41] *FEC v. CMA*, slip op. at 10, n.7, Appendix F at A-14.

[42] *FEC v. CLITRIM*, 616 F.2d at 54-55 (Kaufman, C.J., concurring); *See, Clagett & Bolton, supra* n.11 at 1353-1360, and in particular notes 111 and 116 at 1354; Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373, 419 (1980).

[43] *See Broadrick v. Oklahoma*, 413 U.S. 601, 621-623 (1973) (Brennan, J., dissenting). The pendency of the existing enforcement action has had an impact. In the 1978 primary CALPAC made contributions to thirteen Congressional candidates. No contributions were made in the November, 1978 general election, held after CMA and CALPAC were advised the Commission had found reason to believe a violation of § 441a(a)(1)(C) had occurred. CALPAC's contributions since January 1, 1979 to federal candidates have been negligible.

> sonal liberties when the end can be more narrowly achieved. The breadth of . . . abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 469, 488 (1960). Here less intrusive means are already in operation, obviating the need for a $5,000 calendar year limitation on contributions of administrative support to a political committee.[44]

Contributions to a committee authorized by a candidate to accept contributions are considered to be contributions "made to such candidate," pursuant to § 441a(a)(7)(A). Such contributions apply to a donor's contribution limitation with respect to that candidate set by § 441a(a)(1)(A) or § 441a(a)(2)(A) and the overall limit on contributions of $25,000 per year in § 441a(a)(3). Potential abuse from contributions which appear to be independent but which are actually coordinated by a candidate is also addressed. Expenditures made in cooperation or concert with a candidate must be treated as a contribution under § 441a(a)(7)(B)(i). Re-publication or dissemination of materials produced by a candidate is likewise treated as a contribution under § 441a(a)(7)(B)(ii). Contributions to a committee which have been "earmarked" for a particular candidate are also considered contributions applicable to a contributor's limits with respect to a particular candidate, pursuant to § 441a(a)(8) and 11 C.F.R. § 110.6. The same section treats contributions through an intermediary or conduit as contributions from the original source not the intermediary. Contributions to the maximum allowed by law directly to both a candidate and committees likely to support the candidate are only authorized if the committees are not authorized by the candidate, the contributor does not give with the knowledge that a substantial portion of the con-

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[44]Discussed in *Sproul, supra* n.22 at 493.

tribution will be contributed to that particular candidate, or the contributor does not retain control over the funds contributed.[45] The so-called anti-proliferation provisions appear in § 441a(a)(5) and prevent the use of multiple committees subject to common control through which contributions can be directed to a specific candidate. For purposes of the contribution limitations, all political committees "established or financed or maintained or controlled" by the same entity are considered a single political committee and in the aggregate are subject to a $1,000 or $5,000 limit per federal candidate per election.[46] *See, Walther v. Federal Election Commission,* 468 F.Supp. 1235 (D.C.D.C. 1979).

Thus, a comprehensive anti-evasion scheme exists. The additional burden of limits on support for a political committee is unnecessary. These provisions regulate the relationship between contributors and the recipient candidate, or the candidate's authorized committee.[47] They deal with the contributor-candidate nexus and transactions which have a significant potential for actual or apparent corruption. In contrast, limits on administrative support for a political committee perform no essential function in preventing the evasion of contribution ceilings. It is not a legitimate "loophole-closing" provision. *Buckley v. Valeo,* 424 U.S. at 45. Even with respect to monetary contributions to a committee, the limits are of marginal significance in light of the anti-evasion statutory scheme. Less drastic, alternative means, more reasonably related to a permissible purpose, are already in effect. The majority simply fails to recognize the relationship of these pro-

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[45]Note, *supra* n.19 at 968-970. 11 C.F.R. § 110.1(h). See 11 C.F.R. §§ 110.1-110.13 (1980) for detailed regulations governing contribution and expenditure limitations.

[46]Note, *supra* n.22 at 970. 11 C.F.R. §§ 100.5(g), 110.3 (1980).

[47]*Id.* at 971.

visions and sounds a false alarm in asserting § 441a(a)(1)(C) is necessary to prevent "funneling" of contributions to candidates. *CMA v. FEC*, J.S. at A-7, CCH at 50,990.

The existing range of limitations on contributions to candidates and their committees is sufficient to advance the valid purposes of the Act. The government's purpose in protecting the integrity of the electoral process cannot be pursued by means that broadly stifle first amendment rights. Contributions to political committees, particularly contributions of administrative support, are not inherently corruptive. The restrictions imposed by § 441a(a)(1)(C) do not directly advance a valid governmental interest, particularly since there are other existing measures more closely designed to control evasion of the limitations on contributions to candidates.[48] For this reason, § 441a(a)(1)(C) is unconstitutional, particularly to the extent it limits administrative support.

III

THE OFFENDING PROVISIONS OF THE ACT DISCRIMINATE AGAINST UNINCORPORATED ASSOCIATIONS AND THEIR POLITICAL COMMITTEES IN VIOLATION OF THE FIFTH AMENDMENT

While § 441a(a)(1)(C) limits contributions by any person to a political committee to $5,000 per calendar year, § 441b(b)(2)(C), § 431(8)(B)(vi) and § 431(9)(B)(v) create an exemption from the $5,000 limitation for payments by a corporation or labor organization, made for the establishment, administration or solicitation of contributions to a political committee.[49] Appellants contend these provisions

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[48] *Id.* at 973.

[49] § 431(e)(5)(F) and 431(f)(4)(H) were renumbered as § 431(8)(B)(vi) and § 431(9)(B)(v), respectively, by the 1979 Amendments, *supra* n.2. In the court of appeals, appellants argued the

are unconstitutional to the extent they exclude unincorporated associations and their political committees from the exemption to § 441a(a)(1)(C).

Equal protection analysis in the first amendment area is the same as under the fourteenth amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Unincorporated associations may be treated differently than corporations or labor organizations but the classification must at least be rationally related to a legitimate legislative purpose. *Eisenstadt v. Baird*, 405 U.S. 438, 447-448 (1972). When fundamental interests are affected the classification can only be sustained when a compelling governmental interest is demonstrated. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). No rational basis, much less a compelling interest, exists to justify differing regulation of administrative support by

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reference to membership organizations in § 441b(b)(2)(C) was intended to include all membership organizations, whether incorporated or unincorporated, and that this provision along with its definitional counterparts could be construed to allow unlimited administrative support by an unincorporated association for its political committee. The entire court rejected this construction. *CMA v. FEC*, J.S. at A-18-A-21, CCH at 50,994-50,995; J.S. at A-47-A-57, CCH at 51,003-51,005 (Wallace, J., concurring and dissenting), on the ground § 441b(b)(2)(C) was limted to corporations and labor organizations. Judge Wallace also relied on the absence of any cross-reference in the definitional provisions contained in § 431, J.S. at A-51, n.17, CCH at 51,005, and on legislative history. The comments by Senator Allen which Judge Wallace relied on are themselves ambiguous, with Senator Allen stating at one point:

> The amendment I have would allow cooperatives, nonstock corporations, and membership organizations to set up the same type of segregated funds as a corporation with stock and stockholders or labor organizations.
>
> Why should they be prevented from setting up funds? They are as interested in good government as the corporations with stock and stockholders and labor organizations.

unincorporated associations for their political committees, as compared to support by corporations and labor organizations and their political committees.[50]

A. The Statutory Scheme Fails to Satisfy the Rational Basis Test

The impact of the Act's distinction between unincorporated entities and corporations or labor organizations is real and substantial—the difference between a $5,000 calendar-year ceiling on administrative support and no ceiling at all.[51] The distinction becomes more curious when incorporated and unincorporated associations are compared. Numerous unincorporated membership organizations operate political committees and in a broad sense such organ-

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I believe he would see the merit of allowing nonstock corporations, cooperatives and membership organizations to set up segregated political funds and allow solicitation of the members of such organizations for contributions to that fund.

122 Cong. Rec. 7179 (March 18, 1976), reprinted in FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976.*

[50]Analysis here is limited to administrative support since § 441b (b)(2)(C) speaks only in terms of such support.

[51]In *FEC v. CMA* the district court found that CMA's in-kind support for CALPAC totalled $79,517 during May 11, 1976—December 31, 1976, $104,135 in 1977 and $134,981 in 1978. Apportioning these amounts according to the ratio of federal/state contributions, the Court determined that in 1976 in-kind support totalling $14,631.13 was attributable to $25,950 in federal contributions. In-kind support in 1977 totalled $11,350.72, attributable to federal contributions of only $6,800. In 1978 in-kind support totalled $8,233.84, attributable to federal contributions of $21,300.00. Slip op. at 3, 10, Exhibit F at A-3, A-15.

izations are all basically similar to the extent they operate to further the interests of their members.[52]

It is not apparent how the purpose of preventing corruption or the appearance of corruption can be furthered by unequal treatment of unincorporated associations when compared with corporations and labor organizations. If anything, allowing corporations and labor organizations to provide unlimited support for their political committees appears to be contrary to the purpose of the Act as there is no assurance corporations or labor organizations would not attempt to use administrative support to evade other restrictions. *CMA v. FEC*, J.S. at A-70-A-71, CCH at 51,011-51,012 (Wallace, J., concurring and dissenting.) Appellants are mindful that § 441b(b)(2)(C) and its definitional counterparts may be constitutionally required by *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972). This does not explain the absence of a similar dispensation for unincorporated associations. Encouraging unincorporated organizations to forego the use of a political action committee and to participate directly in political activity may lead to practices contrary to the purpose of the Act. For instance § 441b(b)

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[52]For example, the American Dental Association is an incorporated association. *See California Dental Ass'n v. American Dental Ass'n*, 23 Cal. 3d 346, 350 (1976). It sponsors a multicandidate committee, the American Dental Political Action Committee. FEC, *Index of Multicandidate Political Committees*, 3 (May 15, 1979). The American Medical Association is an incorporated membership organization. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). It sponsors a political Action Committee, the American Medical Political Action Committee (AMPAC). FEC, *Index* at 4. The FEC Index lists numerous other membership organizations that sponsors political committees. *E.g.*, the American Chiropractic Association, American Occupational Therapy Association, American Optometric Association, American Physical Therapy Association, American Podiatry Association, National Education Association, and National Associations of Realtors.

(3)(A) makes it unlawful for a separate segregated fund sponsored by a corporation or labor organization to use undue means to obtain contributions.[53] By using a political action committee, CMA has chosen a voluntary program of political action. Limiting CMA's administrative support of CALPAC encourages political activity by CMA using general funds not specifically donated for political purposes. While this is legally permissible, an unincorporated association's use of funds not explicitly contributed for political purposes to make contributions to candidates is contrary to the purpose of the Act and the voluntarism required for corporate and labor PAC contributions. *See, e.g., Pipefitters Local 562 v. United States*, 407 U.S. at 412; *United States v. Automobile Workers*, 352 U.S. 567, 572 (1957); *cf. Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Appellants are unaware of any showing that "the relative voice of [unincorporated associations] has been overwhelming or even significant . . . or that there has been any threat to the confidence of the citizenry in government," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978), to justify limits on administrative support.

Corporations and labor organizations have broad latitude to engage in effective political action.[54] While §441b (a) prohibits contributions by corporations or labor or-

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[53]§ 441b(b)(3) provides "It shall be unlawful—(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, or financial reprisal or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction." *See Pipefitters Local 562 v. United States*, 407 U.S. 385, 412 (1972) (voluntary contributions to a separate segregated fund do not violate the ban on contributions by labor organizations).

[54]*Sproul, supra* n.19 at 472-492 contains a detailed discussion.

ganizations,[55] several provisions benefit corporations and labor organizations.[56] Under § 441b(b)(2)(A) communications by a corporation to its stockholders and executive or administrative personnel or their families are permitted in unlimited amounts. The same section permits a labor organization to communicate with its members and their families on any subject without limit. These provisions allow corporations and labor organizations to engage in extensive political activity with their stockholders and executive or administrative personnel and their families, or the members of a labor organization and their families, respectively.[57] Under § 441b(b)(2)(B) corporations may engage in "nonpartisan registration and get-out-the-vote campaigns" aimed at stockholders and executive or administrative personnel and their families. Labor organiza-

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[55]It is questionable if these limitations are still valid. *First National Bank of Boston v. Bellotti,* 435 U.S. at 803 (White, J., dissenting).

[56]In *Republican Nat. Committee v. FEC,* 616 F.2d 1 (2d Cir. 1980) (three-judge court) *aff'd,* 100 S.Ct. 1639, the Second Circuit rejected the argument that § 441b, other provisions of the Act and the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001, *et seq.*, discriminated in favor of candidates supported by labor as compared to candidates supported by corporations. As to corporations and labor organizations the court found the Act neutral. Findings of fact regarding corporate and union activity are printed in *Republican Nat. Committee v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9101 (1979) at 50,805-50,806 (S.D.N.Y. 1979).

[57]*See* remarks by Senator Cannon citing the Sun PAC advisory opinion and the existence of over 30 million individual shareholders and 18 million union members, 122 Cong. Rec. S3518 (daily ed., Mar. 16, 1976); remarks of Senator Packwood, *id.* at S3554-3555; and in particular Congressman Vander Jagt's discussion of union communications, 122 Cong. Rec. H2657 (daily ed., April 1, 1976). The legislative history is reprinted in FEC, *The Legislative History of the Federal Election Campaign Amendments of 1976. See also, Bolton, supra* n.42 at 415, concluding § 441b favors labor so far as grass roots activity is concerned.

tions may do the same with their members and families. Under §§ 441b(b)(4)(A) and (B), corporations and labor organizations may engage in unlimited solicitation of their stockholders, their families and executive personnel or their members and their families, respectively. These provisions also allow two written solicitations yearly of any stockholder, executive or administration personnel or employee of a corporation or their families. Under § 441b (b)(5) any method of soliciting contributions available to a corporation is available to a labor organization. Under § 441b(b)(6) a corporation must make available certain solicitation methods to a labor organization representing members working for the corporation. FEC regulations allow use of corporate and union facilities, means of transportation and appearances by candidates or political parties.[58] The provisions outlined above permit vigorous activity to influence and solicit those most likely to respond.

Even though an unincorporated membership organization may contribute directly to a candidate, contributions remain subject to the limits of § 441a(a)(1)(A) or § 441a(a)(2)(A).[59] The opportunity to solicit without limit is not co-extensive with the practical ability to raise funds. Unlimited solicitation efforts by an interest group with respect to a large portion of the public would not result in meaningful returns. The opportunity to solicit the public does not afford a significant benefit in the context of the statutory scheme particularly when the costs of such a solicitation would be paid by CALPAC, except for up to

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[58]11 C.F.R. §§ 114.3(C)(2), 114.4(b), 114.9, 114.12(b) (1980).

[59]Contributions by an unincorporated membership organization and its political committee to the same candidate would probably also be subjected to the anti-proliferation rule of § 441a(a)(5) and 11 C.F.R. § 110.3 which places an aggregate limit on contributions by affiliated committees. As a practical matter there are important

$5,000 yearly. With well over 1,000 PAC's currently in existence much of the public is already represented by a political committee connected with the appropriate affinity group.[60] It is the opportunity to solicit its own members which is of the most benefit to CMA.[61] The alleged balanced regulatory scheme leaves CMA and CALPAC with unlimited solicitation rights which as a practical matter may be of no practical value because of the limit on administrative support, while corporations and labor organizations are permitted effective solicitation and unlimited administrative support.

B. The Offending Provisions of the Act Fail to Satisfy the Compelling Interest Test

Political association is at the core of the first amendment. *Buckley v. Valeo*, 424 U.S. at 14-15; *Elrod v. Burns*, 427 U.S. at 356-357. A classification which infringes the exercise of first amendment rights can only be sustained if there is a compelling interest to support regulation. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *United States v. Robel*, 389 U.S. 258 (1967). There is a significant societal interest in promoting the exercise of first amendment rights, as well as an individualized interest. *First*

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considerations that would prevent many associations from making direct contributions at all, including the potential loss of members. *See First National Bank of Boston v. Bellotti*, 435 at 794, n.34.

[60]Professor Epstein notes that 1,153 PAC's registered with the FEC are affiliated with corporations, 290 are affiliated with labor, and approximately 1,000 other PAC's are affiliated with trade/member/health organizations, cooperatives, corporations without capital stock or have no-connected organization. *Epstein, supra*, n.22 at 356.

[61]Even this is of limited benefit since less than a majority of CMA members donate to CALPAC. The district court found that only 7,000-10,000 of CMA's approximately 25,000 members contributed to CALPAC during 1976-1978. *FEC v. CMA*, slip op. at 2, Appendix F at A-2.

National Bank of Boston v. Bellotti, 435 U.S. at 776. Support for a political action committee, and the discussion of public issues and candidates which results from contributions or expenditures by the committee, is just the type of activity the first amendment protects. Discussion of public issues and candidates is integral to American government, and in the framework of equal protection a compelling interest is necessary to override it. *Buckley v. Valeo*, 424 U.S. at 14-15. Restrictions are only valid in the first amendment context if they "survive exacting scrutiny." *Id.* at 16, 94; *Elrod v. Burns*, 427 U.S. at 362.

The $5,000 calendar year limit imposes a restriction on CMA's participation in the electoral process through the medium of a political action committee and a resulting diminution of direct contributions, independent expenditures or other political activity by the committee. This has the ultimate effect of reducing the total amount contributed to candidates and hence reduces first amendment activities.[62] The importance of the first amendment, and the exercise of the rights guaranteed thereby is not diminished by the source of the activity. It is immaterial that an association or its political committee exercises these rights, because the first amendment was intended to protect the free discussion of governmental affairs and:

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.

First National Bank of Boston v. Bellotti, 435 U.S. at 777. The notion government "may restrict the speech of some elements of our society in order to enhance the relative

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[62]According to one study, since 1972 most campaigns have insufficient funds, and the most competitive sections are those where the most money is spent. *FECA Impact Analysis, supra*, n.26 at 1.

voice of others is wholly foreign to the First Amendment . . ." *Buckley v. Valeo*, 424 U.S. at 48-49.

There is no compelling reason to differentially regulate support by an unincorporated association for its political committee and support by corporations or labor organizations. Allowing corporations and labor organizations to make unlimited contributions to establish and administer a political committee permits them to operate more effective political action committees. As a result, corporations and labor organizations may participate to a greater degree in the electoral process through the medium of a political action committee. Their political action committees will have greater impact, per dollar received as voluntary contributions. The classification created by § 441b(b)(2)(C) imposes a burden on associational rights and discriminates against appellants solely because CMA is unincorporated. This enhances speech by some elements of society, a result prohibited by the first amendment. *Buckley v. Valeo*, 424 U.S. at 48-49. Like the classification in *Williams v. Rhodes*, which favored the two major political parties by placing unreasonable burdens on other political parties, so also do the offending provisions of the Act discriminate against unincorporated membership organizations and their political committees without any compelling justification.

CONCLUSION

The Court should exercise jurisdiction and answer all of the certified questions in the affirmative.

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Appendix F

United States District Court
Northern District of California

No. C-79-1197 WHO

Federal Election Commission,
Plaintiff,

vs.

California Medical Association and California Medical Political Action Committee,
Defendants.

[Filed Oct. 21, 1980]

OPINION

This is a civil enforcement action brought by the Federal Election Committee ("the FEC") against the California Medical Association ("CMA") and the California Medical Political Action Committee ("CALPAC") for alleged violations during 1976,[1] 1977, and 1978 of the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* (hereinafter cited as "FECA"). The FEC claims that CMA made contribu-

[1]The Federal Election Campaign Act was originally enacted in 1972, Pub.L. 92-225, 86 Stat. 11. After the Supreme Court struck down several of its provisions, *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress enacted significant amendments in 1976, Pub.L. 94-283, 90 Stat. 478. The 1976 amendments, which include the provisions in issue here, took effect on May 11, 1976. Thus, all references to alleged violations during 1976 refer only to the period between May 11, 1976, and December 31, 1976. The statute was again amended in 1980, Pub.L. 96-187.

tions to CALPAC in excess of $5,000 during each of those years, in violation of 2 U.S.C. § 441a(a)(1)(C), and that CALPAC knowingly accepted such contributions, in violation of 2 U.S.C. § 441a(f). The matter was tried to the Court upon stipulated facts as well as supplementary testimonial and documentary evidence. For the reasons set forth below, the Court holds that CMA and CALPAC have violated the cited statutory provisions and that judgment should be entered in favor of the FEC.

I

CMA is an unincorporated membership organization of approximately 25,000 individual physicians residing in California. Stipulations to findings of fact (hereinafter cited as "Stipulation") ¶ 2; testimony of Willis Babb. Prior to May 11, 1976, the date on which the statutory provisions in question took effect, CMA formed CALPAC, a nonpartisan political committee. Stipulation ¶¶ 3, 4. CALPAC is registered with the FEC as a political committee and has reported its affiliation with CMA, in compliance with 2 U.S.C. §§ 433, 431(4) and (7). Stipulation ¶¶ 3, 4. CMA directly pays CALPAC's administrative and operating expenses, including salaries, rent, office supplies, postage, computer services, and travel costs. Stipulation ¶ 5. In addition to such in-kind support provided by CMA, CALPAC receives cash contributions and dues from the approximately 7,000-10,000 physicians and their families who constitute its membership. Testimony of Babb and Allen Pross.

CALPAC makes contributions to and expenditures on behalf of candidates in state and federal elections. CALPAC also sponsors conferences and workshops to encourage doc-

tors to get involved in the political process, organizes lobbying expeditions to Washington, D.C., and spends a fair amount of time and money soliciting new members. Testimony of Pross, Babb, and Bradley Davis. CALPAC is run formally by a board of directors, which meets at least annually. Its key policymaking body is an executive committee composed of CALPAC's principal officers. Neither CMA nor the individual contributors to CALPAC specify the uses to which their donations should be put. Such decisions are left to CALPAC's discretion. The recipients and size of CALPAC's contributions to political candidates are determined by its executive committee, acting upon the recommendations of its federal and state candidate selection committees. Pross testimony. The following table indicates the value of CMA's in-kind contributions to CALPAC during 1976, 1977, and 1978, and the total contributions made by CALPAC to federal and state candidates during each of those years.

Table 1

	In-Kind Contributions from CMA to CALPAC	Contributions from CALPAC to:	
		federal candidates	state candidates
1976	$ 79,517	$25,950[2]	$145,685.07
1977	104,135	6,800	55,583.49
1978	134,981	21,300	329,134.30

Stipulation ¶¶ 6-8, 10-12.

In October and November, 1978, the FEC notified CMA and CALPAC first, that it had reason to believe, and sec-

[2]As initially introduced into evidence, Stipulation ¶ 10 stated that CALPAC contributed $32,950 to "clearly identified candidates in federal elections" in 1976. At trial, the parties amended the Stipulation to note that $7,000 of that total was given to the Republican National Committee rather than to any clearly identified candidate.

ond, that it had reasonable cause to believe, that they were violating the FECA because CMA was making and CALPAC was accepting contributions in excess of $5,000 per year. *See* former 2 U.S.C. § 437g(a)(2) and (5)(A) (1976). On April 19, 1979, the FEC determined that there was probable cause to believe that such violations had taken place during 1976, 1977, and 1978. *See* former 2 U.S.C. § 437g(a)(5)(B) (1976).

CMA and CALPAC, along with two individual members of CMA, then filed a declaratory judgment action. *California Medical Ass'n v. Federal Election Comm'n*, C-79-1089 WHO (filed May 7, 1979), *appellate decision on certified questions*, slip op. at 3371 (9th Cir., May 23, 1980) (hereinafter cited as *"CMA v. FEC"*). The doctors sought a declaration that the $5,000 limit on contributions by persons to political committees did not apply to in-kind contributions by unincorporated associations such as CMA and that, if it did, the statute was unconstitutional on its face as applied to CMA and CALPAC because it deprived them of their First Amendment right to free speech and their Fifth Amendment right to equal protection of the law. Two weeks after the doctors commenced their suit, the FEC filed this enforcement action.[3] The FEC sought declaratory and in-

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[3]The FEC's complaint alleged three claims for relief. The first claim—that CMA and CALPAC violated the $5,000 annual limit on contributions to political committees—was the subject of the trial and of this Opinion. The second and third claims—that CALPAC's Statement of Organization filed with the FEC was deficient in that it did not list the Los Angeles County Physicians Committee ("LACPC") as an affiliated or connected organization, and that CALPAC improperly aggregated with LACPC its contributions to a federal candidate—were resolved by a Consent Order filed on January 18, 1980.

junctive relief as well as the imposition of $5,000 civil penalties against each defendant. The defenses raised by CMA and CALPAC were virtually indentical to their affirmative claims in the declaratory judgment action.

Pursuant to the procedures mandated by FECA, this Court certified to the Ninth Circuit the constitutional questions raised in the doctors' declaratory judgment action. *See* 2 U.S.C. § 437h(a). While the parties presented those questions to the appellate court, they simultaneously conducted discovery and pretrial preparation in this enforcement action. Shortly before the scheduled commencement of trial, the parties filed cross-motions for summary judgment. At the oral argument on February 22, 1980, the Court deferred ruling on the summary judgment motions pending the development of a fuller factual record at trial. The trial then took place on March 17 and 18, 1980; three witnesses testified and seventy-five exhibits were admitted into evidence. On May 23, 1980, the Ninth Circuit issued its *en banc* decision in the declaratory judgment action. The court rejected the doctors' arguments, holding that the $5,000 limitation on contributions to political committees applies to in-kind contributions by unincorporated associations and that the statutory provisions which CMA and CALPAC are charged with violating do not infringe their constitutional rights.

II

The Ninth Circuit's resolution of the difficult constitutional and statutory issues has substantially narrowed the scope of this case. The sole remaining issue is almost technical in nature: when contributions to a political committee

are not earmarked for a particular use, and when a political committee uses such contributions for the purpose of influencing federal elections as well as for other purposes beyond FECA's regulatory embrace, how should it be determined whether the contributions exceed FECA's $5,000 limitation on aggregate annual contributions to a political committee?

The statutory section under which CMA has been charged prohibits any person from making "contributions" to any political committee which, in the aggregate, exceed $5,000 per year.[4] 2 U.S.C. § 441a(a)(1)(C). "Contributions" is also the crucial term in the statutory section under which CALPAC has been charged: "No * * * political committee shall knowingly accept any contribution * * * in violation of the provisions of this section." 2 U.S.C. § 441a(f). The statute defines "contribution" first by listing the items included within the general definition and second by listing several exclusions from that definition. 2 U.S.C. § 431(8), formerly 2 U.S.C. § 431(e). The definitional provision that was in effect when the "contributions" in question were made and when this case was filed has since been amended. However, the amendments pertinent to the issues raised here merely simplified the definition without affecting its substantive scope. *See* H. Rep. No. 96-422, 96th Cong., 1st Sess. 6-11, *reprinted in* [1979] U.S. Code Cong. & Ad. News

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[4]The limitation on contributions to political committees established and maintained by national political parties is separately set at $20,000 per year. 2 U.S.C. § 441a(a)(1)(B).

5070-5074.[5] As currently phrased, the general inclusive definition of "contribution" is:

> "(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office;* or
>
> (ii) the payment by any person of compensation for the *personal services* of another person which are

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[5]CMA and CALPAC contend that the recent amendments significantly changed the definition of "contribution." They rely on the fact that the definition in effect during 1976-1978 provided that the payment of a political committee's salary expenses was a contribution where the personal services were rendered "for any such purpose," presumably referring to the general definition of contribution as being made for the purpose of influencing the results of a federal election (or primary). Former 2 U.S.C. § 431(e)(4) and (e)(1) (1976). On the other hand, the amended definitional provision with respect to compensation for personal services rendered to a political committee simply refers to services rendered "for any purpose." 2 U.S.C. § 431(8)(A)(ii). The doctors cite no authority for their suggestion that the deletion of the word "such" represents a substantive modification of the definition. To the contrary, the legislative history of the 1980 amendments indicates that no substantive change was intended. The congressional committee report which accompanied the amendments mentions the addition and deletion of other phrases, but makes no mention of the deletion of "such." It is highly improbable that Congress would have highlighted minor amendments which made little or no substantive changes in the definition, while neglecting to note the more significant changes. *See* H.Rep. No. 96-422, 96th Cong., 1st Sess. 6-11, *reprinted in* [1979] U.S. Cong. & Ad. News 5070-5074.

rendered to a political committee without charge *for any purpose.*" 2 U.S.C. § 431(8)(A) (emphasis added).[6]

The language suggests that whereas donations in the form of money or goods are contributions *if* given to a political committee for federal electioneering purposes, donations in the form of personal services (other than volunteer services, *see* 2 U.S.C. § 431(8)(B)(i)) are automatically deemed to be contributions. In this case, it is undisputed that CMA paid CALPAC's salary expenses in excess of $5,000 during each of the years in question. Stipulation ¶¶ 6-8 (1976—$40,398; 1977—$41,029; 1978—$59,494). On that basis alone, it would be possible to find that the doctors violated the statutory limitation on contributions made to, and knowingly accepted by, a political committee. 2 U.S.C. §§ 441a(a)(1)(C) and 441a(f).

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[6]During the relevant time period (1976-1978), the general, inclusive definition of contribution was as follows:

"(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of—

(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party, or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candi-

However, the Court need not rely on a literal reading of statutory language drafted after CMA's alleged contributions were made. It is well established that the thrust of FECA is to regulate contributions and expenditures made for the relatively narrow purpose of influencing federal elections and that it does not reach activities designed more broadly to promote the discussion of political issues. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 79-80 (1976); *United States v. National Committee for Impeachment,* 469 F.2d 1135, 1140 (2d Cir. 1972). Assuming that CMA's donation of goods *and services* to CALPAC were "contributions" only if donated for the purpose of influencing federal elections, the outcome of this case clearly turns on ascertaining the purpose(s) for which the alleged contributions were made.

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date or political committee without charge for any such purpose, except that this paragraph shall not apply in the case of legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services, other than services attributable to activities which directly further the election of a designated candidate or candidates to Federal office, nor shall this paragraph apply in the case of legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of insuring compliance with the provisions of this Act or chapter 95 or chapter 96 of Title 26 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported in accordance with the requirements of section 434(b) of this title." Former 2 U.S.C. § 431(e)(1)-(4).

Former § 431(e)(1)(A) and (B) were rephrased and carried forward in new § 431(8)(A)(i). Former § 431(e)(4) was rephrased and carried forward as new § 431(8)(A)(ii), with the exception regarding legal and accounting services carried forward as new § 431(8)(B)(ix). Former § 431(e)(2) and (3) were deleted.

As noted above, CMA did not specify the use to which CALPAC should put the donated goods and services. CALPAC did not maintain separate accounts to differentiate between funds used for electioneering in general and those used for educational and lobbying activities. CALPAC has no internal rules or guidelines for the distribution of its funds, and there are no specific items in the budget pertaining to federal as opposed to state electioneering. Stipulation ¶ 9; testimony of Pross, Babb, and Davis. Thus, it has become the Court's task to determine whether CMA's contributions were made for the purpose of influencing federal elections. There appear to be three alternative methods of performing that task. One method, urged by the FEC, is to presume that all contributions to a political action committee are made for the purpose of influencing federal elections. CMA would then bear the burden of rebutting that presumption by establishing that some or all of the contributions were made for other purposes. A second method, urged by CMA and CALPAC, is to require the FEC to prove that each contribution was made for the specific purpose of influencing federal elections. A third method is to allocate the dollar value of CMA's contributions according to the relative proportions of CALPAC's federal and nonfederal activities. For example, if CALPAC gave 75 percent of its candidate contributions to state candidates and 25 percent to federal candidates, then 25 percent of CMA's contributions to CALPAC would be deemed contributions within the meaning of FECA.

The Court is guided in the selection of an appropriate method by the general principles enunciated in other FECA cases, particularly the Ninth Circuit's recent de-

cision regarding the statutory provisions in issue here. The consideration of overriding significance is that although limitations on the amount of contributions to political committees may implicate First Amendment rights, contribution limitations only marginally restrict the exercise of those rights. *Buckley v. Valeo, supra,* 424 U.S. at 20-23.

> "In *Buckley* the Court granted the legislature substantial deference in drawing the Act's contribution limits, without insisting upon the most narrow of categories." *CMA v. FEC, supra,* slip op. at 3381.

By contrast, much less deference is accorded the legislature with respect to the regulation of expenditures by political committees and candidates because those expenditures are directly related to protected political speech. *Buckley v. Valeo, supra,* 424 U.S. at 20-23. Here, the doctors focus on FECA's First Amendment implications in support of their contention that the provisions in question should be narrowly construed and the FEC should be required to prove the specific purpose behind each contribution. However, virtually all of the cases which they cite in this regard involved the regulation of expenditures by, rather than contributions to, political organizations. In each case, the courts narrowly construed the statute to find that advertisements, leaflets, and posters discussing political issues unrelated to any particular election campaign were not "expenditures" subject to regulation or did not render the sponsoring organizations subject to regulation as "political committees" under FECA. *See FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (re publication of antigovernment spending pamphlet); *United States v. National Committee for Impeach-*

ment, supra (re advertisement calling for the impeachment of President Nixon); *FEC v. American Federation of State, County & Municipal Employees,* 471 F.Supp. 315 (D.D.C. 1979) (re poster critical of then-President Ford's pardon of former President Nixon); *American Civil Liberties Union v. Jennings,* 366 F.Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats v. American Civil Liberties Union,* 442 U.S. 103 (1975) (re advertisement opposing the Nixon Administration's proposed legislation to limit the busing of school children). In this case, none of CALPAC's expenditures is in issue and there is no doubt but that CALPAC is a political committee subject to regulation under FECA. As the Ninth Circuit stated in rejecting the doctors' First Amendment challenge to the statute:

> "[A] political committee is, by design as well as definition, a natural conduit for candidate contributions and * * * the essential purpose of the provision here in question is to limit those contributions, not to limit expenditures for any other type of political advocacy. * * *
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> * * * * *
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> * * * A critical point in this case is that CMA and any other association may spend as much as it chooses to collect for political speech, including advocacy of a particular candidate's election. The limitation here in question applies only to candidate contributions and payments to multicandidate political committees. And the intrusive potential of the limitation is further diminished when it is noted that, as forcefully and often as it chooses, CMA can solicit its members, and anyone else, to give directly to CALPAC." *CMA v. FEC, supra,* slip op. at 3378-3379.

Another significant principle articulated by the Ninth Circuit is that the statutory provisions governing contributions to political committees should be construed so as to make meaningful and enforceable the dollar limits on such contributions.

> "We have already concluded that there is a legitimate purpose for a limit on an association's contributions to political committees. The administrative assistance provisions are simply a necessary part of this statutory scheme. The Act prevents evasion by including administrative assistance in computation of the dollar limit." *Id.* at 3385.

The above-quoted language compels this Court to reject the doctors' proposed method of computing contributions made for federal electioneering purposes, because to adopt that method would permit and invite CMA, CALPAC, and others similarly situated to evade FECA's contribution limits by using clever accounting practices. Inasmuch as CMA never indicates the purpose for which it makes its contributions to CALPAC, and CALPAC commingles all of its funds and uses all of its staff to promote various different purposes, it would be well-nigh impossible for the FEC to prove which of CMA's contributions were made for federal electioneering purposes. If the doctors' proposed method were employed, any political committee could flaunt with impunity the statutory contribution limits simply by being imprecise in its solicitations and bookkeeping. The fact that FECA does not govern contributions aimed at

influencing state elections would be converted into a means of effectively nullifying the statutory limitations on contributions aimed at influencing federal elections.[7]

Once the doctors' proposed method of computing contributions made for federal purposes is rejected, it becomes unnecessary in this case to choose between the two remaining methods. Even under the method more favorable to the defendants, whereby CMA's contributions to CALPAC are allocated according to CALPAC's state and federal contributions, the $5,000 limit was exceeded in each of

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[7]This is not to suggest that CMA and CALPAC would be penalized for not employing the accounting procedures outlined in the FEC's regulations. As of April 13, 1977, the FEC requires political committees involved in both state and federal election campaigns either to maintain a separate account solely for contributions and expenditures related to federal elections, or to establish a separate political committee "which shall receive only contributions subject to the prohibitions and limitations of the Act, regardless of whether such contributions are for use in connection with federal or non-federal elections." 11 C.F.R. § 102.5 (1980) (formerly 11 C.F.R. § 102.6). Where a solely-federal campaign committee is established, it is to "allocate administrative expenses on a reasonable basis between their Federal and non-Federal accounts in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis." 11 C.F.R. § 106.1(e). Neither regulation addresses precisely the situation involved here. Section 102.5 applies to financial contributions capable of being placed in a bank account, rather than to in-kind contributions. Section 160.1(e) pertains to expenditures by, rather than contributions to, political committees. However, the regulations are instructive insofar as they suggest feasible means by which CMA and CALPAC could comply with, and the FEC could enforce, the contribution limits where in-kind contributions are made to a multi-purpose political committee.

the years in question. The following table illustrates the application of the allocation method to the facts here:[8]

Table 2

	1976	1977	1978
1. CALPAC's contributions to federal candidates ..	$ 25,950.00	$ 6,800.00	$ 21,300.00
2. CALPAC's contributions to state candidates	145,685.07	55,583.49	329,134.30
3. % federal	18.4%	10.9%	6.1%
4. CMA's contributions to CALPAC	79,517.00	104,135.00	134,981.00
5. Amount attributable to federal purposes (line 3 × line 4)	14,631.13	11,350.72	8,233.84

Thus, the Court concludes that CMA violated 2 U.S.C. § 441a(a)(1)(C) during 1976, 1977, and 1978 by making contributions to CALPAC in excess of $5,000 per year.

The Court also concludes that CALPAC violated 2 U.S.C. § 441a(f) by knowingly accepting such excessive contributions from CMA during each of the years in question. The record clearly establishes that CALPAC knew that CMA was paying for its operating and administrative expenses and that CALPAC voluntarily and intentionally accepted CMA's in-kind payments. That CALPAC did not know whether in-kind contributions by unincorporated associations were subject to the $5,000 limit, a fact which no one "knew" until the Ninth Circuit's decision was handed down on May 23, 1980, does not save it from liability. CALPAC knew the facts (accepting in-kind contributions exceeding $5,000 from CMA) which rendered its conduct unlawful. Such knowledge is sufficient to create civil liability under

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[8]Data in lines 1, 2, and 4 taken from Stipulation ¶¶ 6-8, 10-12.

2 U.S.C. § 441a(f). *Cf. In re Federal Election Campaign Act Litigation,* 474 F.Supp. 1044, 1047 (D.D.C. 1979). CALPAC has *not* been charged with a "knowing and willful violation" which must be shown in order to impose FECA's double-penalty provision. 2 U.S.C. § 437g(a)(6)(C).

III

In addition to a declaration of the defendants' liability, the FEC seeks the imposition of civil penalties and the issuance of a permanent injunction. FECA authorizes the Court to impose a civil penalty "which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in [the] violation." 2 U.S.C. § 437g(a)(6)(B), formerly 2 U.S.C. § 437g(a)(5)(C) (1976). In this case, the civil penalty may not exceed $9,631.13 for the 1976 violation, $6,350.72 for the 1977 violation, and $5,000 for the 1978 violation.[9] Thus, the maximum penalty would be a total of $19,235.69. The FEC limited its request to a $5,000 penalty for each defendant because of the complex constitutional and statutory questions surrounding this litigation. In light of that factor, the Court finds that a $5,000 penalty upon each defendant is reasonable and appropriate.

The propriety of injunctive relief, which is authorized by the same statutory provision cited above, is governed by a three-part test. The Court is to consider whether (1) the defendants acted in good faith and with diligence to cure the violation, (2) the task faced by the defendants in complying with the statute was complex and whether the

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[9]These figures were computed by subtracting $5,000 from the figures listed on line 5 of table 2. The 1978 figure is set at $5,000 in the text because the excessive portion of the contribution was $3,233.84, which is less than $5,000.

statute was difficult to interpret, and (3) an order would have any effect in ensuring better compliance in the future. *FEC v. Committee for a Constitutional Presidency-McCarthy '76,* Fed. Elec. Campaign Financing Guide (CCH) ¶ 9074 at 50,632 (D.D.C. 1979). In this case, the FEC has not shown that the defendants did not act in good faith to attempt to cure the violation. Both parties acknowledge the complexity of the issues and the facial ambiguity of at least some of the statutory provisions in question. Finally, there is no indication that an injunction would be necessary in order to ensure future compliance with FECA's contribution limits. Thus, the Court concludes that injunctive relief is not warranted at this time.

This Opinion constitutes findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Accordingly, IT IS HEREBY ORDERED that:

1. Judgement shall be entered in favor of the Federal Election Commission and against the California Medical Association and the California Medical Political Action Committee on the Federal Election Commission's first claim for relief.

2. Each defendant shall pay a civil penalty of five thousand dollars ($5,000) to the Federal Election Commission.

The parties shall lodge a stipulated form of judgment by October 31, 1980.

Dated: October 21, 1980.

/s/ WILLIAM H. ORRICK

William H. Orrick
United States District Judge

Appendix G

United States District Court
for the District of Columbia

Common Cause, et al., Plaintiffs v. Harrison Schmitt, et al., Defendants Federal Election Commission, Intervenor	CA 80-1609 (Consolidated) Three-Judge Court
Federal Election Commission, Plaintiff v. Americans for Change, et al., Defendants	CA 80-1754 Three-Judge Court

[Filed Sept. 30, 1980]

Case heard before *Circuit Judges* TAMM and WILKEY, and *District Judge* PENN, Three-Judge District Court.

Opinion filed for the court by *Circuit Judge* WILKEY.

OPINION

WILKEY, Circuit Judge:

The Federal Election Commission ("FEC"), and Common Cause, a public interest organization, sued in two separate actions various groups of Ronald Reagan sup-

porters who plan to spend monies to promote his chances in the 1980 presidential election. Both plaintiffs alleged that the plain language of section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act")[1] prohibits the defendants' proposed expenditures which will exceed $1,000 to further the election of Ronald Reagan. As the Republican candidate for President, Mr. Reagan is entitled under the Fund Act to receive, and has already accepted almost $30 million in public campaign funding. Pursuant to 26 U.S.C. section 9011(b) this three-judge district court was convened with jurisdiction to "implement or construe" the Fund Act. The statute further directs the court to act as quickly as practicable. On 19 August 1980 we heard oral argument on the scope and constitutionality of section 9012(f). On 28 August 1980 the court issued two expedited Orders granting, *inter alia*, summary judgment for the defendants in the FEC action, and dismissing the Common Cause action. In this Opinion we develop our reasoning for the two Orders of 28 August.

I. STATUTORY PROHIBITION AGAINST EXPENDITURES BY POLITICAL COMMITTEES

A. *Background*

The defendants in both actions are various organizations, as well as a few of their organizers, who are broadly soliciting contributions from individuals who favor Ronald Reagan for president. These organizations plan to use the money they collect—they hope to raise and spend millions of dollars—to hire professional media and political consultants and purchase advertising, *etc.* They intend these

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[1] 26 U.S.C. § 9001 *et seq.* (1976)

expenditures to yield an effective program to promulgate their political views before the November election. The defendants organizations have registered with the FEC as "political committees."[2] The defendants' literature and solicitation materials detail their support for Ronald Reagan and outline their intention to spend the sums collected to realize their collective aspirations for the presidential election.

B. *Statutory Basis: Jurisdiction and Substantive Prohibition*

1. *Jurisdiction in a Three-Judge District Court*

The FEC is plainly authorized by section 9011(b)(1) of the Fund Act to seek a declaratory judgment "that section 9012(f) validly prohibits expenditures in excess of

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[2]A "political committee is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

26 U.S.C. § 9002(9(1976)

Under another statute, the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 433(a)(1976), any "political committee" that is not an authorized campaign committee must file a statement of organization with the FEC within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The definition of "political committee" within the FECA is roughly the same as the definition of that term in the Fund Act.

$1,000 such as defendants have indicated they intend to undertake."[3] The statute is set out in full in the margin.[4] The right of Common Cause to bring such an action, on the other hand, is equivocal. We will reserve all discussion of the Common Cause lawsuit until Parts IV and V below.[5]

The statute requires a three-judge district court to entertain actions to "implement or construe" the Fund Act. This action to test the scope and validity of section 9012(f) is within the jurisdiction of this court to "implement or construe" provisions of the Act.

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[3]Motion of FEC for Summary Judgment at 30.

[4]26 U.S.C. § 9011(b)(1976) provides:

§ 9011. Judicial review

(b) Suits to implement chapter—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [*sic*, quoted here as "construe"] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[5]Common Cause requested substantial discovery of defendants as well as injunctive relief, neither of which was integral to the FEC complaint. *See* Parts IV-V *infra*.

2. *Prohibition Against Expenditures by "Political Committees"*

The plain language of section 9012(f) proscribes categorically the defendants' planned expenditures. They, the defendant "political committees," plan "to incur expenditures" "in an aggregate amount exceeding $1,000" "to further the election" of presidential candidate Reagan. This program of expenditures is a criminal offense according to the statutory section which is entitled "Criminal penalties." In pertinent part it reads:

> § 9012. Criminal penalties
>
> (f) Unauthorized expenditures and contributions.—
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
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> * * *
>
> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

We understand section 9012(f)(1) to prohibit *all* expenditures over $1,000 by political committees including *"in-*

dependent expenditures." An independent expenditure is an expense incurred by a political committee free of any coordination with the official and authorized campaign committees of the candidate. We reject the limiting construction of section 9012(f) offered by defendants Harrison H. Schmitt, Carl T. Curtis, and Americans For Change. They suggest that the provisions may be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate.[6] Though this "saving" construction would neatly preserve the statutory proscription from constitutional infirmity under *Buckley v. Valeo*[7] the language of the section will not support this rescue.

The section's plain terms apply broadly to *all* expenditures and this is in contrast with another section, section 9002(11) of the Fund Act, where Congress did adopt limiting language of this kind. If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses[8] rendering the proviso unnecessary.

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[6]*See* Memorandum of Points and Authorities in Support of Motion to Dismiss of Defendants Harrison H. Schmitt, Carl T. Curtis and Americans For Change at 10-13.

[7]424 U.S. 1, 46-47 & n. 53 (1976).

[8]*See* 26 U.S.C. § 9002(11) (1976).

Also, another election law statute, 2 U.S.C. section 441a (a)(1)(A), already prohibits individuals, groups, and committees from making contributions in excess of $1,000. A "contribution," however, is defined, in 2 U.S.C. section 441a (a)(7)(B)(i), to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate. . . ." Hence we can only read the expenditure prohibition in section 9012(f) to mean what it says: *all expenditures* over $1,000 by political committees which further a presidential candidate's election are illegal. We are compelled then to determine the constitutionality of this expenditure limitation consistent with the First Amendment analysis conceived in *Buckley v. Valeo.*[9]

II. FIRST AMENDMENT ANALYSIS UNDER *BUCKLEY v. VALEO*

In *Buckley v. Valeo*[10] the Supreme Court held that the campaign expenditure ceilings imposed by Congress in the Federal Election Campaign Act of 1971 ("FECA")[11] were unconstitutional. The Court reasoned that a statutory restriction on amounts which citizens, groups, or candidates could expend in a political campaign was an impermissible limitation of the freedoms of speech and association protected by the First Amendment. The watershed case controls the election law case before this court. Thus a discussion of *Buckley* is appropriate before beginning our own constitutional analysis of the severe expenditure ceiling imposed on political committees.

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[9]424 U.S. 1 (1976).

[10]*Id.* at 12-59.

[11]2 U.S.C. § 431 *et seq.* (1976)

A. *Campaign Expenditures Are Speech*

The Supreme Court made quite clear in *Buckley* that the power of Congress to regulate federal elections was well-established under the Constitution.[12] That power to regulate, however, is not unbounded; it must of course be exercised consistent with rights guaranteed by the Constitution.

Campaign activity is speech on the highest constitutional plane. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[13] Moreover, political expression in a campaign is associational activity also protected by the First Amendment. The Constitution guarantees the " 'freedom to associate with others for the common advancement of political beliefs and ideas', a freedom that encompasses '[t]he right to associate with the political party of one's choice.' "[14]

The Supreme Court noticed in *Buckley* the reality that public communication is expensive. Free speech is costly. Television, radio, newspapers, buttons—the Court has

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[12]*Buckley* v. *Valeo,* 424 U.S. at 13.

[13]*Id.* at 14 (quoting *Roth* v. *United States,* 354 U.S. 476, 484 (1957)).

[14]*Id.* at 15 (quoting *Kusper* v. *Pontikes,* 414 U.S. 51, 56, 57 (1973) (*quoted in Cousins* v. *Wigoda,* 419 U.S. 477, 487 (1975)).

> "The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo,* 424 U.S. at 15. The Court noted that the constitutional right of association was derived from the role of group association to advocate *effectively* public and private points of view. *Id.* (citing *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958)).

acknowledged that "these expensive modes of communication [are] indispensable instruments of effective political speech."[15] A restriction on the amount which can be spent on political communication is a practical limitation on the political issues which can be addressed or answered in a campaign. It also limits the range of participants in the political debate, and the size of the audience.

B. *Level of Judicial Scrutiny*

It was strenuously argued to the Supreme Court in *Buckley* that *expenditures* in a campaign entailed primarily "conduct" and not "speech." The Court rejected this contention emphatically,[16] stating that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment."[17] "[T]he governmental interests

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[15] *Id.* at 19.

[16] *Id.* at 16.

[17] *Id.* (citations omitted).

> Unlike [*United States* v. *O'Brien*], [391 U.S. 367 (1978) (draft-card burning case)] where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money [in a campaign] "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S. at 382. *Id.* at 17.

Obviously Congress *intends,* albeit neutrally, to regulate the speech-potential of money contributions and expenditures through the election laws it enacts. The giving and spending of money is alluring to the candidate because of the speech-potential it provides to him or her, while to Congress that particular speech-potential also

advanced in support of the Act [*i.e.*, FECA] involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interests groups who have money to spend and reducing the overall scope of federal election campaigns."[18] Following *Buckley,* then, it is plain that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court.

C. *Compelling Governmental Interest*

The Supreme Court considered three governmental interests adduced to support the contribution and expenditure ceilings: to prevent corruption, or, the appearance of corruption; to mute the voices of affluent groups and persons; and, to put a "brake" on the ballooning cost of election campaigns.[19] Only the first interest, to squelch corruption, was held constitutionally sufficient to support the FECA's $1,000 contribution limitation—a limitation on speech. The Court was crystal-clear in stating that Congress had no valid power to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections . . ."; because, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[20]

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represents the enticement that could be the wedge of corruption, tainting the candidate and the election process. Thus Congress's regulatory intention with respect to campaign contributions and expenditures necessarily involves the regulation of speech.

[18]*Id.* at 17.

[19]*Id.* at 25-26.

[20]*Id.* at 48-49.

In short, the Court has indicated the prevention of corruption is the singular compelling governmental interest justifying the limit on maximum contributions to candidates. Congress has constitutional authority, the Court held, to ensure that the marketplace of ideas in an election is not recast as a marketplace of "influence."

D. *Constitutional Distinction Between Contributions and Expenditures*

The Court *did not accept* that even the compelling anti-corruption governmental interest supported a limitation on *expenditures* in a campaign. The Court reasoned that limitations on *expenditures* were more restrictive of First Amendment rights than limitations on *contributions,* hence the congressional objective to protect the new contribution ceilings by closing the so-called loop-hole of "independent" expenditures was constitutionally insufficient.[21] Preventing corruption would justify the contribution ceilings but would not also justify expenditure ceilings that redress only tangentially the corruption problem (*i.e.*, by "protecting" contribution limits from circumvention), yet severely impinge on free speech rights.[22] Controlling contributions, the Court believed, would exorcise *quid pro quo* from the political scene.[23] Impeding the opportunity for venal politician/contributor relationships was a constitutionally valid means of accomplishing the governmental interest in fighting corruption. Contribution ceilings preserve electoral integrity without directly impinging on the rights of indi-

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[21] *Id.* at 44.

[22] *Id.* at 45.

[23] Id.

viduals.[24] On the other hand, "the independent advocacy restricted by the [expenditure] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[25] For, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[26]

The right of citizens and groups to make expenditures in a campaign poses, according to the Court, only the most attenuated danger of *quid pro quo*. Evidently, *spending* money can just not be equated with *giving* money as a source of possible corruption. The Court noted that the threat of corruption in political spending was mitigated to a large extent by coupling unlimited expenditures with a strict restriction on contributions (which the Court upheld). There was no evil in collecting small amounts from myriad individual contributors and then translating those funds into political communication spreading the candidate's message.[27] Thus the Court struck down FECA's section 608(e)(1) which limited independent expenditures, saying, "[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[28]

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[24] *Id.* at 58.

[25] *Id.* at 46.

[26] *Id.* at 47.

[27] *See id.* at 56 & n.64 (quoting from Judge Tamm's separate opinion, concurring in part and dissenting in part, *Buckley* v. *Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975)).

[28] *Id.* at 58-59 (emphasis added).

A final perspective on *Buckley's* requirement of unlimited expenditures[29] comes from the more recent explication of the election laws in the *Republican National Committee v. Federal Election Committee* trilogy.[30] These cases upheld public financing of presidential elections. Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions. The candidate's decision, however, cannot bind his or her supporters outside the official campaign. Public funding—and the election law after *Buckley*—leaves open to supporters a wide range of means to express their support and their politics. In fact, *Republican National Committee* would appear to mean that the restrictions associated with public funding (*e.g.*, no private contributions, expenditure ceilings, *etc.*) are permissible only because the rights of supporters are left untouched. "Most important", reflected the court, is that

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[29]Pivotal to the Court's analysis of electoral integrity *vis a vis* independent expenditures was the statutory provision that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id.* at 46. The Court recognized that it was one thing for Congress to restrict expenditures free from the candidate's control, but quite another for Congress (validly) to limit sham, "independent" expenditures, which being in the candidate's effective control amounted to nothing more than masked contributions and could be regulated as such.

[30]100 S.Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *and*, 616 F.2d 1 (2d Cir.) (*en banc*).

"uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley v. Valeo.*"[31]

III. SECTION 9012(f) LIMITATIONS ON EXPENDITURES BY POLITICAL COMMITTEES INHIBITS FIRST AMENDMENT FREEDOMS

The foregoing discussion of *Buckley* indicates the dubious constitutional quality of election law ceilings limiting amounts which may be independently expended in a campaign. The *Republican National Committee* cases still reserve a highly protected status for *independent expenditures* even since the advent of (conditional) public funding for presidential candidates (who accept the terms). Now we turn to our own constitutional analysis of section 9012(f)'s prohibition of independent expenditures by political committees in excess of $1,000. This analysis turns on two fundamental questions which will explore whether section 9012(f) is consistent with the First Amendment after *Buckley:* (1) Does the proposed spending by the defendant political committees constitute an "expenditure" question under *Buckley*?, and (2) Are political committees, under *Buckley,* entitled to the same First Amendment rights to make independent expenditures as individuals and "informal groups?" We answer both questions affirmatively and hold that section 9012(f) is facially unconstitutional.

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[31] *Republican National Committee* v. *Federal Election Committee,* 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court), aff'd summarily, 100 S.Ct. 1639 (1980) (citing *Buckley,* 424 U.S. at 39-51).

A. *Political Committee Prohibition Is an Expenditure Limitation and Thereby Limits Speech*

Under *Buckley* and the *Republican National Committee* cases the right of individuals and groups (outside of official campaigns) to make independent expenditures is a constitutional pillar of the election laws. Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding.[32] There is no constitutional reason that the organization of individual supporters of a candidate into groups called "political committees" should impugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship.

1. *This is Not a "Contribution" Case*

Buckley indicated clearly that expenditure limitations jeopardize First Amendment rights more severely than do limitations on contributions.[33] Consequently, *Buckley* held that the governmental interest in cleansing the electoral process of possible corruption was not enough to validate restrictions on expenditures. A "contribution" case, on the other hand, is entitled to less-exacting judicial scrutiny because "the transformation of contributions into political debate involves speech by someone other than the con-

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[32]*See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S. Ct. 1639 (1980).

[33]*See* Part II. D. *supra.*

tributor."[34] The case before this court is an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction.

The defendant political committees are simply "pooling agents" for many small voices wishing to make intelligible political statements. The money expended by the committees pays for political communications which speak the language of their members and contributors. It is the speech of the contributors which is defrayed by the contributions. Earlier, we noted that political speech is expensive nowadays. It requires a lot of money and a lot of sophistication to yield effective communication in the political arena. Political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message. A simple example explains the efficiency argument: One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however, they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication. Since it is beyond contention that individuals and "informal groups" may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groups of like-minded individuals.

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[34] *Buckley* v. *Valeo*, 424 U.S. at 21.

2. *Individuals Speak Through Political Committees*

The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. The contributors do have power over the speech disseminated by the political committees. Political speech like this is possible in the first instance only because the contributors contribute to one particular committee or another. Contributors associate in a particular political committee because that committee will express their own thoughts, which benefit thereby from amplitude in numbers and professionalism. If a committee disappoints its membership, contributions will dry up.

To require that contributors to political committees literally draft their own television and other public messages is naive. These contributors express themselves through political committees—their First Amendment rights are not merely coextensive with their actual participation in drafting specific language. The language drafted by the steering groups of the political committees reflects the political speech common to all of the member-contributors. That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age. One thousand individuals have just as much right to join together to do this as one man or woman to do it alone. It emasculates

the guaranteed right of association to disallow political committees from organizing and focusing the views of their adherents.[35] Thus the expenditures undertaken by the political committees represent an efficient exercise of First Amendment rights of associated individuals. This exercise warrants the highest protection under *Buckley* and *Republican National Committee.*

3. *Speech Emanating from Political Committees Is Different from a Candidate's Speech*

A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the nonpublicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates are loosely tethered, not bound, to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interests based on a broader constituency. (This

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[35] *See* Part III. B. 2 *infra.*

explains the apprehension with which many candidates' organizations look on the activities of uncoordinated and uncontrollable independent committees, but this does not and cannot limit the right of these independent committees to make their contribution to the robust political debate in any way they and their associates choose.)

The above comparison highlights once again the factual reality, as well as constitutional reality following *Buckley* and *Republican National Committee,* that the rights of candidates and their supporters are distinct. In *Buckley,* the Court realized that candidates could be ambivalent toward the independent political forays of their supporters. The Court noted that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[36] Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, they can express viewpoints which seek to influence or prod the candidate and the public. That individuals, through their political committees, hope for a candidate's election in no way means that their own speech is interchangeable with the candidate's. The Constitution entitles even mainstream individuals favoring mainstream candidates to communicate their separate, if sympathetic, views.

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[36] *Buckley* v. *Valeo,* 424 U.S. at 47.

4. *Political Committees Cannot Wield the* Quid Pro Quo: *The Compelling Interest in Eliminating Corruption is Insufficient to Justify Section 9012(f)*

As elaborated in Part II above, the *Buckley* Court sustained FECA's contribution, though not expenditure, limits on the basis of the compelling governmental interest in protecting elections from the taint of corruption. The Court saw in contributions to candidates the real possibility of corrupting *quid pro quos.* Independent expenditures, the Court felt, could not pose the same *quid pro quo* problem.

Similarly, the anticorruption interest cannot support the prohibition against *independent* expenditures by political committees. Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are *independent.* A *coordinated,* non-independent expenditure by a committee might harbor a *quid pro quo,* but no more so than an individual's expenditures might.[37] Coordinated expenditures, by individuals or committees, are treated like contributions;[38] such contributions to a publicly funded candidate are of course illegal, but are inapposite to the constitutional issue here under consideration.

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[37]In fact, the large-scale operation of a political committee, requiring registration with the FEC, would be less capable of keeping a *quid pro quo* secret than could a wealthy individual operating without the bright sunshine of public scrutiny.

[38]*See* notes 7-9, 29 & accompanying text *supra.*

It is difficult, then, to imagine how the thousands of "small voices" associated together in a political committee could compromise a candidate for President. The political committees are venting the political ideas and commitments of their members, not of the candidate. The candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them. It is individuals themselves, acting in association, who are addressing political issues through independent expenditures. This public comment may persuade, and thereby influence decision-makers, but it is protected by the First Amendment.[39]

A further check does now exist, however, on the power of political committees to finance the views of their members: contributions to committees are restricted in amount by 2 U.S.C. section 441a(a)(C). An individual may give only up to $5,000 to a political committee. This particular contribution limitation was not addressed directly in *Buckley,* but might be constitutionally permissible according to the *Buckley* rationale, which upheld other such limits.[40] What all of this clearly indicates is that while

[39]*See Let's Help Florida* v. *McCrary,* 621 F.2d 195 (5th Cir. 1980).

[40]Contribution limits to political committees have been upheld in two recent cases. *See California Medical Association* v. *FEC,* No. 79-4426, slip op. (9th Cir. 23 May 1980); *Mott* v. *FEC,* No. 79-3375 (D.D.C. 30 June 1980). Congress could, perhaps, if these authorities are upheld, shrink reasonable limits on contributions as it might deem necessary to control further possibilities for corruption in the electoral process. We have no occasion here to express any view on the constitutionality of specific limitations on contributions to political committees. *But cf. California Medical Association* v. *FEC,* No. 79-4426, slip op. at 25-26 (9th Cir. 23 May 1980) (Wallace, J., concurring and dissenting):

political committees may have the power to express sympathy and agreement with candidates, neither they nor individual members have the power to control the candidates they favor.

B. *Political Committees Have First Amendment Rights Commensurate With Individuals' Rights*

In the preceding section we demonstrated that the prohibition of section 9012(f) raises an *expenditure* question under *Buckley,* thereby implicating highly protected free speech rights. We also showed how political committees simply pool funds and channel the joint speech of their members. We now turn to consider directly the closely related question: whether political committees, as multi-person organizations, have First Amendment rights so inferior to those of individuals that they fall out from the protective aegis of *Buckley*?

1. Buckley *Comprehends First Amendment Rights for Groups*

It is absolutely plain that free speech rights protected under *Buckley* extend beyond individuals. The Court there overturned "substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression. . . ."[41]

Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political market place with other more affluent 'persons' capable of huge personal expenditures.

[41]424 U.S. at 58-59 (emphasis added). The Court also wrote: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups,* and candidates." *Id.* at 39 (emphasis added).

Furthermore, the Supreme Court has also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, *association,* union or individual."[42] As a "political committee" is defined in 26 U.S.C. section 9012(9) as "any committee, association or organization" which receives contributions or makes expenditures for the purpose of influencing a candidate's election, it should fall under the same general protection reserved for groups and associations wishing to communicate their interests to the public. The fact of receipt of contributions (to finance expenditures) does not distinguish political committees from any other association which takes an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may, it has been decided, lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications, *e.g.*, television, magazine, newspaper, billboard advertisements, *etc.*, which the committee would undertake. Individuals—wealthy or otherwise—groups and associations, and political committees all engage in the same speech activities. In all cases the speech is meant to express active support for or opposition to a particular candidacy; *i.e.*, to express affiliation with and approval for the ideas of that candidate, or the reverse. This active support or opposition is buttressed by the "profound na-

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[42] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

tional commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[43]

2. *Freedom of Association Requires That Individuals Be Allowed to Join in Political Committees*

If section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force. This right of association is crucial under the Constitution and recognized in *Buckley*. We believe what the *Buckley* Court said about FECA's contribution and expenditure limits is dispositive here on the right of individuals to join political committees and thereby amplify their ability to speak publicly on matters of political concern. The Court said:

> The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, *but leave the contributor free to become a member of any political association and* to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote

[43] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

We note that the election law exempts press organizations, 26 U.S.C. § 9012(f)(2)(A), and tax-exempt "section 501(c)" organizations, *id.* § 9012(f)(2)(B), from the limitations applicable to political committees. This discrimination against political committees along with the discrimination in favor of wealthy individuals is without constitutional foundation.

> effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP v. Alabama,* 357 U.S. at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion). See *Cousins v. Wigoda,* 419 U.S., at 487-488; *NAACP v. Button,* 371 U.S. 415, 431 (1963).[44]

Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that. This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. An independent association dedicated to effective political expression which was not in essence a "political committee" would be either an exempted organization,[45] or terribly quaint. The Constitution protects potent political voices along with the more effete ones; the First

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[44] *Buckley* v. *Valeo,* 424 U.S. at 22-23 (emphasis added).

[45] *See* note 43 *supra.*

Amendment ensures both that persons may speak, and that they may speak together.

C. *Conclusion—Section 9012(f) Violates the First Amendment*

Given our holdings that section 9012(f) is an expenditure restriction, and is, therefore, a powerful inhibition on political speech, we must strike down that section as it fails to survive the strict scrutiny required by the First Amendment. The compelling governmental interest to fight electoral corruption is insufficient, here as in *Buckley,* to justify what amounts to a direct limitation on political speech. Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate.

IV. COMMON CAUSE SUIT DISMISSED AS MOOT

In Count I of its lawsuit Common Cause sued for injunctive and declaratory relief to the effect that section 9012(f) applied to the defendant political committees and prohibited their proposed expenditures. This involves the same issue as in the action brought by the FEC, herein resolved against the FEC. Consequently, as in our 28 August 1980 Order, we dismiss Count I of Common Cause's action as mooted pursuant to our decision in the FEC action. We express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit before this court.

V. COMMON CAUSE MAY NOT SUE *TO ENFORCE* THE ELECTION LAWS

Count II of the Common Cause Complaint does not implicate section 9012(f)'s prohibitions against independent expenditures. Rather, the theory of Count II is "that the defendant committees are not in fact independent of Ronald Reagan and his authorized committees. The violations of the Fund Act that Count II alleges are violations that result from, and are premised upon, coordination and concerted action between defendant committees and the Reagan campaign."[46] We understand Count II to be an impermissible attempt by Common Cause, a private plaintiff, to enforce the Fund Act. We are without subject-matter jurisdiction under section 9011(b) to hear this claim.[47] The FEC is charged by statute with exclusive enforcement jurisdiction of the election laws, and moreover, the alleged illegal coordination would violate Fund Act provisions only with respect to *candidates,* not the defendant political committees; therefore, we hold also that Count II fails to state a claim upon which relief can be granted.

A. *No Subject-Matter Jurisdiction to Hear a Coordination Claim*

Section 9011(b) of the Fund Act grants jurisdiction to three-judge district courts of the United States to entertain

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[46]Plaintiffs' Opening Brief on the Merits at 50.

[47]Whether a single-judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court. Our holding dismissing Count II does not require explicit consideration of the Article III "case or controversy" requirement. As we find ourselves without subject-matter jurisdiction we leave open the question of Common Causes's standing to bring Count II of its complaint.

actions "to implement or construe" provisions of the Fund Act whether or not the plaintiff has exhausted administrative or other remedies.[48]

Count II, though, raises complicated questions of fact and difficult questions of election law policy which are without the scope of "implement or construe." It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration,[49] to supervise extensive discovery and receive detailed factual evidence. This fact-finding, of course, is prerequisite to—and pertains only to—a determination of *compliance* with the election laws. A compliance issue is not one properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a nonexpert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

Congress ordered expedition in judicial review under section 9011(b) because elections come up fast and candidates, whoever they turn out to be, and others, need to know whether and how the election laws apply, and how much they provide.[50] So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubtful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates.

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[48]26 U.S.C. § 9011(b)(1) & (2) (1976).

[49]26 U.S.C. § 9011(b)(2) (1976).

[50]*See* S. CONF. REP. NO. 92-533, 92d Cong., 1st Sess. 53-54 (1971); 117 CONG. REC. H. 12, 119 (9 Dec. 1971).

Three-judge district courts are convened typically in order to judge a statute's constitutionality on its face, or to clarify a statute's meaning and application pursuant to standard judicial statutory construction. Three-judge district courts were used in *Buckley* and *Republican National Committee* as a forum for constitutional challenges to the Fund Act.[51] In short, we view the section 9011(b) jurisdiction of this court narrowly. The narrow view is inherent in "implement or construe," by which we understand Congress to have limited the competence of this court to questions of fundamental statutory interpretation and to pressing pre-election questions of uncertainty regarding funds allocable to candidates.[52] Questions of Fund Act violations that require elaborate investigation of unique factual situations are not proper subjects for this court.

B. *FEC Has Exclusive Enforcement Jurisdiction*

Congress has legislated in no uncertain terms with respect to FEC dominion over the election law. Section 437c(b)(1) of FECA reads:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of Title 26 [*i.e.*,

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[51]*See also Jones v. Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (substantial constitutional question prerequisite to convening of three-judge district court). All precedents are in accord supporting the proposition that three-judge district courts are extraordinary legal forums which are convened only to hear cases of special public interest.

[52]The time-sensitivity of a candidate's—and others'—need to know about available funds explains § 9011(b)'s provision of jurisdiction notwithstanding any exhaustion of administrative remedies.

> the Fund Act]. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.[53]

Since we view Count II as clearly an enforcement action, an action to ensure compliance with various provisions of the Fund Act, we must hold that FECA's section 437c(b)(1) precludes any consideration of alleged coordination of expenditures as pressed by Common Cause before this court.

The FEC itself adjudges Count II of the Common Cause complaint as an action to enforce the election laws.[54] The FEC which was allowed to intervene in the Common Cause action moved to dismiss Common Cause's complaint for lack of subject-matter jurisdiction.

The FEC's position on its enforcement jurisdiction has recently been vindicated by a panel of the Court of Appeals for this circuit.[55] That court held that violations

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[53]2 U.S.C. § 437c(b)(1), as amended by Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1355 (1979).

[54]FEC Motion to Dismiss at 11 & n.8. The FEC contended in footnote 8 that its "suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act," rather, it "seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. § 9012(f) pursuant to 26 U.S.C. § 9011(b)." In text the FEC wrote that Common Cause was simply "bring-[ing] an enforcement action in the guise of a suit to implement or construe the statute."

[55]*Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80-1841 & 80-1842, slip op. (D.C. Cir. 12 Sept. 1980).

of the election laws[56] must first be brought before the FEC as within that agency's exclusive jurisdiction. The *Carter-Mondale* holding that the FEC has exclusive jurisdiction with respect to alleged campaign violations and noncompliance controls here.[57]

C. *Alleged Violations in Count II Do Not Apply to Political Committees*

Common Cause alleges in Count II that the defendant committees' proposed expenditures will violate sections 9003(b)(1), 9003(b)(2), 9012(a)(1), and 9012(b)(1) of the Fund Act. These provisions apply to presidential candidates who receive federal funding and must, therefore, limit their own expenditures and forgo private contributions.[58] Each of these sections can be violated only by *the candidate* receiving federal funds. Thus Count II does not state a claim alleging a violation of the Fund Act

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[56]The alleged violations in *Carter-Mondale* involved the same issues of coordination between political committees and the official Reagan campaign that are the substance of Common Cause's Count II. *See id.* at 8.

[57]"Exclusive jurisdiction," held the court, was especially powerful in the election law context. The law "provides for FEC enforcement through both informal consent proceedings and formal proceedings." *Id.* at 11. An FEC investigation may completely absolve the challenged conduct, or may result in a partial vindication resolved by a consent decree. The intrusion of massive discovery requests by a private party, like Common Cause, would plainly upset the delicate balance in the structure of campaign regulation. Common Cause would unsettle the coherent administration of election law policy and practice if allowed to go forward with Count II of its complaint.

[58]Candidates may not restrict the individual rights of their supporters as a result of the choice to accept public funding. *See* notes 30-32 & accompanying text *supra*.

by the defendant political committees. This also confirms the impropriety of permitting a private party to enforce the election laws at its own discretion. For these reasons we dismiss Count II also for failure to state a claim upon which relief can be granted.

CONCLUSION

Consistent with our Orders of 28 August 1980, we deny the FEC's motion for summary judgment and grant summary judgment for the defendant political committees and individuals on the grounds that section 9012(f) violates the Constitution. We dismiss Count I of the complaint brought by Common Cause as moot; Count II is dismissed for lack of subject-matter jurisdiction and for failure to state a claim.

So ordered.

/s/ EDWARD ALLEN TAMM

Edward A. Tamm
Circuit Judge

/s/ MALCOLM RICHARD WILKEY

Malcolm Richard Wilkey
Circuit Judge

/s/ JOHN GARRETT PENN

John Garrett Penn
Circuit Judge

September 30, 1980

Supreme Court, U. S.
FILED
DEC 24 1980

No. 79-1952

In the Supreme Court of the United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, EN BANC

BRIEF FOR APPELLEES

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DECEMBER 24, 1980

QUESTIONS PRESENTED

(1) Whether 2 U.S.C. § 437h should be construed to be consistent with the Commission's exclusive enforcement authority and the orderly processes of federal courts.

(2) Whether this Court should affirm the *en banc* decision of the court of appeals that 2 U.S.C. §§ 441a (a) (1) (C), 431 (8) (B) (vi),* and 441b (b) (2) (C) are consistent with the first and fifth amendments to the Constitution of the United States.

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* *See* note 3, *infra.*

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1952

CALIFORNIA MEDICAL ASSOCIATION, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, EN BANC

BRIEF FOR APPELLEES

OPINIONS BELOW

The May 23, 1980, opinion of the United States Court of Appeals for the Ninth Circuit (J.S. at A-1)[1] is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127. The order of the United States District Court for the Northern District of California which certified constitutional questions to the court of appeals (J.S. at A-82) is not reported. The October 21, 1980, opinion of the United States District Court for the Northern District of California in the related enforcement action (App. Br. at A-1) is not reported.

JURISDICTION

Appellants assert jurisdiction in this Court pursuant to 2 U.S.C. § 437h.[2] On October 6, 1980, this Court post-

[1] As used herein "J.S." refers to appellants' jurisdictional statement, "J.A." refers to joint appendix, and "App. Br." refers to Brief of Appellants.

[2] This provision is § 310 of the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3,

poned consideration of jurisdiction until hearing on the merits. J.A. at 32.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("FECA" or "Act"). Specifically at issue are 2 U.S.C. §§ 437g and 437h with regard to the jurisdiction of this Court, and 2 U.S.C. §§ 441a(a)(1)(C), 431(8)(B)(vi),[3] and 441b with regard to the merits of the decision below. For the Court's convenience, the Commission submits herewith ten copies of *Federal Election Campaign Laws* compiled by the Federal Election Commission.

COUNTERSTATEMENT OF THE CASE

2 U.S.C. § 437c(b)(1) vests in the Federal Election Commission ("FEC" or "Commission") exclusive jurisdiction with respect to civil enforcement of FECA.[4] Set

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as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The revelant provisions of the Act are codified in Title 2, United States Code. Because of the recent amendments to the statute, citations herein will be to the United States Code sections as they appear in United States Code Annotated (West Cum. Ann. Pocket Part 1980), unless otherwise indicated.

[3] Section 431(8)(B)(vi) is the recodification of former 2 U.S.C. § 431(e)(5)(F) pursuant to Sec. 101 of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 at 1341. The court of appeals' decision used the former citation, § 431(e)(5)(F).

[4] *See In re Carter-Mondale Election Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 (D.C. Cir. 1980); *Federal Election Commission* v. *Americans for Change*, Nos. 80-1754, 80-1609 (D.D.C. Sept. 30, 1980) (three-judge court), *notice of appeal filed*, October 8, 1980, App. Br. at A-46; *Common Cause* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9123 (D.D.C. 1980) at 50,952; *In re Federal Election Campaign Act Litigation*, 474

out in § 437g is an elaborate and detailed enforcement procedure which includes expedited, *de novo* review in the district court, appeal to the court of appeals and review by this Court upon *certiorari* or certification pursuant to 28 U.S.C. § 1254. *See* 2 U.S.C. § 437g(a)(6)-(9). In addition, FECA contains a separate, extraordinary judicial review provision intended for "actions . . . as may be appropriate to construe the constitutionality of any provision of" FECA. 2 U.S.C. § 437h.

A. Proceedings Before the Commission

On October 4, 1978, the Commission found "reason to believe" that the California Medical Association ("CMA"), an unincorporated association, had violated 2 U.S.C. § 441a(a)(1)(C) by contributing in excess of $5,000 per calendar year to the California Medical Political Action Committee ("CALPAC"), a multicandidate political committee, and that CALPAC had violated 2 U.S.C. § 441a(f) by knowingly accepting such contributions.[5] 2 U.S.C. § 437g(a)(2). Letters notifying CMA

F. Supp. 1051 (D.D.C. 1979); *Walther* v. *Baucus*, 467 F. Supp. 93 (D. Mont. 1979); *Walther* v. *Biden*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9084 (D. Del. 1979); *Walther* v. *Anderson*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9085 (D. Minn. 1979); *Durkin for U.S. Senate Committee* v. *Federal Election Commission*, No. C80-503D (D.N.H. Oct. 31, 1980).

[5] FECA provides that a "person" (defined at 2 U.S.C. § 431(11) to include associations) may contribute $1,000 per election to a federal candidate, $20,000 per calendar year to national party committees, and $5,000 per calendar year to any other political committee. 2 U.S.C. § 441a(a)(1). A "multicandidate political committee," defined at 2 U.S.C. § 441a(a)(4), may contribute $5,000 to a candidate, $15,000 to national party committees, and $5,000 to any other political committee. Individuals are limited to contributing $25,000 overall in any calendar year. 2 U.S.C. § 441a(a)(3).

Corporations and labor organizations may not, consistent with FECA, make any contribution or expenditure in connection with federal elections. 2 U.S.C. § 441b(a). The exceptions to this proscription allow corporations and labor organizations to pay for communications and certain non-partisan activities directed at specified classes and to pay for the establishment, administration,

and CALPAC of the Commission's action were sent on October 16, 1978. On November 15, 1978, after providing CMA and CALPAC a reasonable opportunity to demonstrate that no action should be taken, the Commission determined there was "reasonable cause to believe" that CMA had violated § 441a(a)(1)(C) and that CALPAC had violated § 441a(f). 2 U.S.C. § 437g (a)(5)(A) (1976).[6] The Commission endeavored to correct the apparent violations through informal conciliation but such efforts failed. Thus, on April 19, 1979, the Commission determined there was probable cause to believe that the Act had been violated and authorized its staff to institute a civil action for relief.[7] 2 U.S.C. § 437g(a)(6)(A). The Commission notified CMA and CALPAC that it would file a civil action to enforce the statute.

B. CMA v. FEC

Fourteen days after CMA and CALPAC were advised that the Commission had authorized a civil enforcement action, the instant action was filed, challenging the statutory provisions sought to be enforced, and seeking an injunction to prevent enforcement. *California Medical Association* v. *Federal Election Commission*, ("*CMA* v.

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and solicitation expenses of a separate segregated political fund. 2 U.S.C. § 441b(b)(2).

The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8). Exempted from this definition is "any payment made or obligation incurred by a corporation or a labor organization which, under § 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." 2 U.S.C. § 431(8)(B)(vi).

[6] The 1979 FECA Amendments eliminated the "reasonable cause to believe" determination in the Commission's enforcement procedures.

[7] The Commission's enforcement action alleged three violations by CALPAC. The second and third claims were resolved by a consent order filed on January 18, 1980. App. Br. at A-4 n.3.

FEC") J.A. at 4.[8] On May 17, 1979, CMA and CALPAC moved the district court in the instant case for certification of constitutional questions pursuant to § 437h. Plaintiffs argued that their "right to have a constitutional question certified immediately to the Court of Appeals is set forth in § 437h . . ." and that "[i]t is clear from the language of § 437h(a) that the District Court *must* immediately certify all questions of constitutionality to the Court of Appeals." Plaintiffs' Memorandum in Support of Motion for Certification at 7-8 (emphasis in original). The district court denied the Commission's motion to dismiss, which had argued, *inter alia*, that § 437h was not intended and should not be used to circumvent § 437g enforcement procedures. On July 9, 1979, the district court certified questions to the court of appeals *en banc*.[9] J.S. at A-82.

On August 1, 1979, the court of appeals set the briefing schedule for the instant case. J.A. at 30. The court specifically ordered that the parties:

> . . . address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Id. On May 23, 1980, the court of appeals rendered its decision. J.S. at A-1. The court upheld the constitutionality of the challenged provisions, and, with regard to FECA's extraordinary jurisdictional provision, stated:

> We hear the appeal en banc pursuant to Fed. R. App. P. 35. Standing and jurisdiction are conferred by, *inter alia*, 2 U.S.C. § 437h(a) (1976). *See*

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[8] The Commission authorized suit on April 19, 1979, and notified CMA and CALPAC on April 23, 1979. CMA filed the instant action on May 7, 1979.

[9] The district court apparently construed § 437h as a mandatory certification procedure:

> Pursuant to the procedures *mandated by FECA*, this Court certified to the Ninth Circuit the constitutional questions raised in the doctors' declaratory judgment action. *See* 2 U.S.C. § 437h(a).

App. Br. at A-5 (emphasis added).

> *Buckley* v. *Valeo*, 424 U.S. 1, 8-12 (1976) (per curiam).

Id. at A-3. However, after posing the question of § 437h's constitutionality and of the potentially "severe and disruptive" effect of § 437h on the court's calendar, the court of appeals concluded:

> Delicate questions such as those here suggested [concerning § 437h] are to be decided only when necessary. We think the better course is to let our decision to hear the case en banc rest on our authority under Fed. R. App. P. 35. *See Buckley* v. *Valeo*, 519 F.2d 821, 902 n.2 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam).

J.S. at A-26.

C. FEC v. CMA

The Commission filed its enforcement action, the case CMA and CALPAC sought to prevent, in the same district court fifteen days after the instant case was filed. *See* note 8, *supra*. *Federal Election Commission* v. *California Medical Association*, No. C-79-1197-WHO (N.D. Cal. Oct. 21, 1980) ("*FEC* v. *CMA*"), App. Br. at A-1. Thus, the instant case, before the *en banc* court of appeals, proceeded simultaneously with the Commission's enforcement action in the district court. On October 21, 1980, the district court issued its opinion. App. Br. at A-1. Judge William H. Orrick noted in the court's opinion that "[t]he defenses raised by CMA and CALPAC were virtually identical to their affirmative claims in the [instant] declaratory judgment action." App. Br. at A-5. The district court held that CMA and CALPAC had violated the Act and that judgment should be entered in favor of the FEC.

The Commission's enforcement action—the case in which the substantive allegations herein were raised as affirmative defenses—is not before this Court. Rather, that case is subject to review by the court of appeals and by this Court only upon *certiorari* or certification. 2 U.S.C. § 437g(a)(9). CMA and CALPAC have until

February 9, 1981, to appeal the district court's decision in *FEC* v. *CMA* to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

I

This case presents the threshold issue of the proper construction of 2 U.S.C. § 437h, a provision enacted by Congress in 1974 for the specific purpose of facilitating the resolution of a major constitutional challenge to the Act prior to the 1976 general election. *See Buckley* v. *Valeo*, 519 F.2d 817, 820 (D.C. Cir. 1975) (Bazelon, J., dissenting) (extraordinary procedure of § 437h was designed for the *Buckley* challenge, and the *Buckley* case was *sui generis*), *aff'd in part*, 424 U.S. 1 (1976) ("*Buckley*"). Section 437h is to be utilized in a manner consistent with the exclusive enforcement authority of the Federal Election Commission and with the orderly process of adjudication in federal courts contemplated in 2 U.S.C. § 437g.

However, appellants herein, the California Medical Association (an unincorporated association) and the California Medical Political Action Committee (a political committee), seek to invoke the extraordinary process of § 437h for the purpose of avoiding the Commission's enforcement procedures. The Commission submits that Congress did not intend § 437h to be used for such a purpose. A finding to the contrary would be inconsistent with congressional intent to vest in the Federal Election Commission exclusive jurisdiction for the application and enforcement of FECA. To permit § 437h to be invoked in this case would bring about the disruption of the enforcement procedures of FECA and of the judicial process of federal courts.

Thus, this Court should find that no right of appeal lies herein since constitutional questions were improperly certified to the court of appeals. Moreover, the Commission submits that the appellate court's reliance on Rule 35 of the Federal Rules of Appellate Procedure (rather than

on § 437h) as its basis for its *en banc* consideration of this case supports the Commission's position that this case is not properly before this Court by right of appeal.

Treating appellants' jurisdictional statement as a petition for *certiorari*, the Court should deny the petition or affirm the judgment of the court of appeals as to the constitutionality of the challenged provisions.

II

Should this Court decide that an appeal lies, or, treating appellants' jurisdictional statement as a petition for *certiorari*, decide not to deny the petition, the Court should affirm the decision below. The provisions challenged by appellants violate neither the first amendment nor the fifth amendment to the Constitution of the United States.

A

The $5,000 limitation on contributions to political committees is plainly within first amendment bounds under the principles established by this Court in *Buckley*. As the court below found, the $5,000 limit serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley* to uphold other contribution limits of FECA. It prevents persons, including associations like CMA, from contributing massive, unlimited sums to political committees such as CALPAC, thereby effecting contributions to candidates well beyond $1,000 in amount.

As with the contributions held to be limitable in *Buckley*, a contribution to a political committee is no more than a "symbolic expression of support" which can only result in political expression "by someone other than the contributor." *Buckley*, 424 U.S. at 21. Thus, the limitation on such contributions does not restrict "core First Amendment expression." *Id.* at 48.

Other provisions of FECA do not fully satisfy the vital governmental interest in preventing circumvention of the per candidate contribution limitations through the device of contributing to political committees likely to support a particular candidate. The $5,000 limitation on contribu-

tions to political committees is thus closely drawn to further the interests found sufficient by this Court in *Buckley*.

B

The provisions of FECA which separately regulate corporations and labor organizations and which allow them to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund, do not violate the equal protection component of the fifth amendment. As the court below observed, the corresponding prohibitions and restrictions applicable only to corporations and labor organizations under 2 U.S.C. § 441b make inapposite any comparison with unincorporated associations such as CMA.

Congress had a rational basis for, and indeed a compelling interest in, separately limiting political contributions and expenditures by corporations and labor organizations. That Congress created an exemption from the restrictions applicable to these organizations for the establishment, administration and solicitation expenses of a separate segregated fund does not negate the rationale of the classification.

Unlike persons not regulated under § 441b, corporations and labor organizations can make neither contributions nor expenditures in connection with any federal election. Partisan communications and certain voter registration and get-out-the-vote activities may not extend beyond stockholders, executive and administrative personnel, members, and their families. Solicitations for contributions to a corporation's or labor organization's separate segregated political fund are specifically restricted by the statute in terms of who may be solicited, and when and how they may be solicited. The argument that unincorporated associations and other persons are situated similarly to corporations and labor organizations is undercut by the fact that unincorporated associations are not subject to the restrictions of § 441b. This demonstrates that Congress has not violated due process by permitting certain confined activity to the latter organizations.

ARGUMENT

I. SECTION 437h SHOULD NOT BE CONSTRUED TO DISRUPT THE COMMISSION'S EXCLUSIVE ENFORCEMENT AUTHORITY OR THE ORDERLY PROCESSES OF FEDERAL COURTS.

This Court, on October 6, 1980, postponed consideration of jurisdiction until hearing on the merits of the instant action. J.A. at 32. The Commission submits that Congress intended that § 437h, the provision upon which appellants rely for jurisdiction in this Court, be narrowly construed. Such a construction would prevent disruption of FECA's orderly enforcement procedures and would avoid premature constitutional adjudication and piecemeal litigation [10] and the consequent disruptive effects upon federal courts.[11]

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[10] *See Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of related appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

Id. at 178, *quoting McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891). *See also Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Andrews* v. *United States*, 373 U.S. 334 (1963).

[11] *See Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc., supra*:

> A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals.

385 U.S. at 25 n.3, *quoting Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2d Cir. 1960) (Clark, J., dissenting).

A. Congress Enacted § 437h for a Specific, Limited Purpose.

FECA's expedited review provision was enacted by Congress as a special mechanism to provide prompt judicial consideration of constitutional questions raised during congressional debate over the Federal Election Campaign Act Amendments of 1974.[12] This unique jurisdictional provision was introduced by Senator Buckley during consideration of S. 3044. Senator Buckley defined the purpose of the amendment:

> It merely provides for the expeditious review of the constitutional questions I have raised.[13]

On June 26, 1974, the Committee on House Administration drafted its version of the 1974 FECA Amendments. Congressman Frenzel proposed an amendment which was identical to Senator Buckley's:

> This is a Judicial Review amendment and its intent is simply to speed up a Judicial Review on the Constitutionality of any Section of this particular bill. It was known as the Buckley amendment in the Senate and . . . it seems to me it is a good idea to

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[12] Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[13] 120 Cong. Rec. 10562 (1974). *Buckley* v. *Valeo*, 519 F.2d at 820 (Bazelon, J., dissenting) (the extraordinary procedure of § 437h was designed for the *Buckley* challenge and the *Buckley* case was *sui generis*); *Martin Tractor* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (1978), *aff'd*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied sub nom, National Chamber Alliance for Politics* v. *Federal Election Commission*, 49 U.S.L.W. 3332 (1980) (*"Martin Tractor"*) ("Section 437h(a) had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. . . ."); *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 134 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), No. 80-2069 (D.C. Cir. Sept. 4, 1980) (*"Mott"*) ("Arguably, Senator Buckley was concerned only with the expedited review of the sweeping changes contained in the 1974 Amendments").

> have a process that offers a chance for speedy review of questions on the bill.[14]

Discussion in the markup session centered upon the multiplicity of suits which this provision might encourage and the accompanying strain on federal courts due to the *en banc* review requirement. The review provision of the House bill, essentially identical to that introduced by Senator Buckley, became § 207(c) of H.R. 16090, as introduced. The conferees accepted the House version:

> The Conference substitute generally follows the House amendment and makes it clear that these special judicial review provisions are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, related to the activities regulated by the Act.[15]

This became § 315 of FECA, as amended, 2 U.S.C. § 437h.

In addition to the review provision of § 437h, Congress vested enforcement authority in the FEC. The Act requires that the Commission bring actions to enforce the Act *de novo* in district court with judicial review of district court orders upon petition to the court of appeals and petition for *certiorari* or certification to this Court.[16] Congressman Hays characterized the intent of Congress when he stated:

> . . . the delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein. . . .

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[14] Markup - Federal Election Campaign Act Amendments of 1974 by the House Comm. on House Administration, 93d Cong., 2d Sess. 704 (1974).

[15] H.R. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 96 (1974).

[16] 2 U.S.C. § 437g(a)(5), (a)(9) (1970) (Supp. V). Both provisions were subsequently amended to their present form by § 109 of the Federal Election Campaign Act Amendments of 1976, *supra*, and § 108 of the Federal Election Campaign Act Amendments of 1979, *supra*.

120 Cong. Rec. 35134 (1974). The Federal Election Campaign Act Amendments of 1976 and 1979, *supra*, maintained this balance of rights and remedies.

B. Congress Did Not Intend That the Extraordinary Procedure of § 437h Be Employed to Disrupt Enforcement Actions Brought By The Commission.

The legislative history of §§ 437g and 437h gives no indication that Congress contemplated that persons brought into the enforcement process and entitled to its judicial review mechanism would be able to compel the extraordinary procedures of § 437h with regard to that enforcement action. Instead, Congress created one mechanism for judicial consideration of pending Commission enforcement proceedings, and another for constitutional challenges to FECA under § 437h. Congressional intent in this regard must be given effect.

In the first instance, Congress has employed a traditional role for federal courts—prosecutorial action brought by an agency in federal district court in which a defendant may raise all defenses and from which lies an appeal to the court of appeals. In the second instance, Congress enacted a very narrow provision pursuant to which *en banc* courts of appeals have jurisdiction to hear and decide certified constitutional questions. This provision, § 437h, is limited to appropriate constitutional questions raised by eligible plaintiffs concerning the facial constitutionality of FECA. Challenges to the Act as applied to defendants, challenges to Commission regulations, or actions to construe the Act are not appropriate under § 437h.[17] A more expansive reading of § 437h would encourage respondents in Commission enforcement matters, and plaintiffs in actions against the Commission under § 437g(a)(8),[18] to circumvent the pro-

[17] Section 437h, by its very language limits action thereunder to "actions . . . as may be appropriate to construe the constitutionality *of any provision of this Act.*" (Emphasis added). *See also* section C, *infra* at 18; *Buckley* v. *Valeo*, 519 F.2d at 851.

[18] 2 U.S.C. § 437g(a)(8) provides that a person aggrieved by Commission action dismissing his or her § 437g(a)(1) complaint,

cedure for judicial review established by Congress in § 437g and to compel an *en banc* court of appeals and this Court to decide constitutional defenses in the midst of an enforcement proceeding.

The instant case presents just that situation. Appellants, advised that the Commission was about to file an enforcement action in district court, immediately sought to circumvent that action by instituting this case. Parallel to the § 437h case, the Commission's enforcement action proceeded in the district court, where CMA and CALPAC raised, briefed and argued the certified questions as affirmative defenses. Thus, the federal court system, needlessly and contrary to congressional intent, was burdened with two separate cases involving the same parties, posing the same constitutional issues and arising from the same set of facts. These two cases, however, will proceed through the federal court system and to this Court in a dramatically different fashion. The enforcement action, which is not yet before this Court, is subject to appeal to the court of appeals in the traditional manner and subject to review, upon *certiorari*, by this Court. 2 U.S.C. § 437g(a)(9). The instant action, however, alleging § 437h jurisdiction, was certified to

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or by a failure of the Commission to timely act, has a right of action against the Commission in federal court. Recently, in *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*, No. 80-0354 (D.D.C. Dec. 16, 1980), plaintiffs brought such an action alleging, in Count one, that the Commission's interpretation' of FECA was contrary to law. Counts two, three and four alleged that if the Commission's statutory construction was not contrary to law then the statute is unconstitutional. The FEC's motion for summary judgment as to Count one was granted but its motion to dismiss the remaining Counts, and to deny § 437h certification, was denied. *Id.* The court stated that it "is aware that this course could result in parallel proceedings in the Court of Appeals, with a three-judge panel hearing an appeal from this court's ruling on the first cause of action and the en banc Court considering the constitutional questions." *Id.*, slip op. at 9 n.14. However, the court concluded that "[o]nce constitutional questions emerge in the course of litigation, the statute requires prompt certification to the appellate court." *Id.*, slip op. at 8.

the *en banc* court of appeals and is now before this Court by alleged right of appeal.[19] Because appellants filed the instant action, they have successfully avoided review of their affirmative defenses under the § 437g procedure. The Commission submits that such dual litigation makes a mockery of the carefully drafted procedure enacted by Congress and codified in § 437g.

Additionally, such simultaneous litigation encourages piecemeal adjudication, needlessly burdening the federal judiciary as well as the Commission. According to appellants' reading of § 437h, any person[20] who is brought into the enforcement procedure, receiving, for example, a notification required by § 437g(a)(2), could file immediately a declaratory and injunctive action raising affirmative defenses framed in constitutional terms,[21] while the Commission is required by statute to proceed on a complaint filed pursuant to § 437g(a)(1) within the time constraints established in § 437g. Under appellants' theory, the respondent in the enforcement procedure could bring a portion of that matter—the affirmative defense—to the federal courts under § 437h while the enforcement matter was pending before the Commis-

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[19] The court below specifically disclaimed § 437h as the basis for its *en banc* decision, relying instead upon Rule 35, FRAP. J.S. at A-26-27. Where, as in the instant case, the court of appeal's *en banc* decision is not rendered pursuant to § 437h, no right of direct appeal to this court should lie pursuant to that provision.

[20] Since neither CMA nor CALPAC is "The Commission, the national committee of any political party or [an] individual eligible to vote," this case necessarily raises the issue of the proper construction of § 437h standing. *Cf. Martin Tractor*, 460 F. Supp. 1017 (D.D.C. 1978), *with Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979). *See* discussion, *infra*, at 20-21.

[21] *See, e.g., FEC* v. *Lance*, No. 78-1859 (5th Cir.) (*sua sponte* certification to *en banc* court of the constitutionality of § 441b in context of subpoena enforcement action); *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) (constitutional challenge raised by intervenor in an enforcement action and certified prior to decision on the enforcement action). *See also* note 18, *supra*.

sion. Not until the Commission filed its enforcement action in court, if it determined that such action should be taken,[22] would the entire case be within the judicial system. Again, however, the affirmative constitutional defenses and the Commission's enforcement action would proceed through different courts under different procedures.[23]

Moreover, CMA/CALPAC's construction of § 437h is contrary to traditional principles of constitutional adjudication. Even prior to the Commission's, or the district court's, interpretation as to the applicability of the statute, the *en banc* court of appeals is asked to rule on the constitutionality of a provision of the Act. This court has long disfavored this type of constitutional adjudication. Even in cases before the Court under the former Criminal Appeals Act of 1907, as amended, 18 U.S.C. § 3731,[24] constitutional adjudication was avoided, where possible:

> The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed

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[22] Only by a vote of 4 of its 6 voting members may the Commission authorize a civil action to enforce the Act. *See* 2 U.S.C. §§ 437c(c), 437d(a)(6). *See also Buckley*, 424 U.S. at 112 n.153.

[23] Since the Judiciary Act of 1789, 1 Stat. 73, 84, the policy of federal courts has been that appeal will lie only from a final decision. *See, e.g., Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940); 28 U.S.C. § 1291. Exceptions to this policy have been narrowly construed. For example, in *Parr* v. *United States*, 351 U.S. 513 (1956), the Court stated that "extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals." *Id.* at 520. *See also Switzerland Cheese Association, Inc.* v. *E. Horne's Market, supra* (narrow interpretation of 28 U.S.C. § 1292(a)(1) "lest a floodgate be opened that brings into the exception many pretrial orders"). 385 U.S. at 23-24.

[24] 18 U.S.C. § 3731 (1964) (Supp. V) prior to amendment by the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, provided for direct appeal from district courts to this Court from certain decisions and judgments. Thus, "decisions of District Courts raise almost abstract questions of law regarding the invalidity or construction of criminal statutes, in that they do not come here in the setting of normal adjudications on the merits of a controversy." *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 127 (1948) (Frankfurter, J., concurring) ("*U.S.* v. *CIO*").

> admonition, of self-imposed inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U.S. 283, 295. Observance of this principle makes for the minimum tension within our democratic political system where "scarcely any question arises . . . which does not become, sooner or later, a subject of judicial debate." 1 De Tocqueville, Democracy in America (4th Am. ed. 1843), 306. (footnote omitted).

United States v. *International Union, United Automobile Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 590 (1957). *See also U.S.* v. *CIO*, 335 U.S. at 106; *Martin Tractor*, 627 F.2d at 379. Section 437h should not be construed to require constitutional adjudication in advance of more traditional judicial consideration as to the meaning and application of the statute. Absent such statutory construction and a determination of its applicability, federal courts will be faced, in § 437h cases, with the ever-present possibility of rendering advisory opinions, a task considered beyond the jurisdiction of federal courts since 1793 when President Washington requested that Chief Justice Jay construe certain federal laws and treaties. *See* 3 *Correspondence and Public Papers of John Jay* 486 (H. Johnston ed. 1893).[25]

Finally, CMA/CALPAC's interpretation of § 437h divests federal courts of any discretion in declaratory § 437h actions. CMA and CALPAC argued to the district court that it was required to certify questions.[26] Appel-

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[25] Indeed, a reading of § 437h which would require a federal court to issue an advisory opinion on the constitutionality of FECA would "prevent . . . [the judiciary] from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

[26] *See* note 9 *supra* and accompanying text. *But see Martin Tractor*, 627 F.2d at 379 n.10, *citing Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 243 (1952) ("the propriety of declaratory relief in a particular case will depend upon a circum-

lants now argue to this Court that "[o]nce the court of appeals has decided a matter properly certified under [§ 437h(a)] the right of appeal to this Court lies." App. Br. at 18. Under this construction no court, including this Court, could determine or review the propriety of certification.

The present case demonstrates the absurdity of expanding § 437h to encompass affirmative defenses to an enforcement action. Should CMA and CALPAC appeal the district court's decision in *FEC* v. *CMA*, the Ninth Circuit will be confronted again with the same controversy, though limited to non-constitutional issues. Presumably, the case would then reach this Court again by petition for writ of *certiorari*. Clearly, such duplication and waste of judicial resources could have been—indeed should have been—avoided by declining § 437h jurisdiction. Nothing in the legislative history of § 437h indicates that the provision was to be used in these circumstances.

C. Federal Courts have Narrowly Construed the Extraordinary Process of § 437h.

FECA's extraordinary jurisdictional provision for review of constitutional challenges has received appropriately narrow interpretation by most federal courts. Even in *Buckley* v. *Valeo*, *supra*, the case for which § 437h was designed,[27] the court of appeals recognized the necessity of limiting certification to the *en banc* court of appeals.[28]

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spect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power"); *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971) (principles which guide injunctive relief will also guide granting of declaratory judgment); *Lampkin* v. *Connor*, 360 F.2d 505, 508, 509 (D.C. Cir. 1966) (broad discretion exists to decline to issue declaratory judgments).

[27] *See* note 13, *supra*.

[28] The court of appeals, in preliminarily "deeming [*Buckley*] to be properly certified . . . under § 437h and declaring that it would be considered *en banc*, . . . took care . . . to base its decision to hear

In exercising the inherent discretion of federal courts in declaratory actions,[29] courts have generally focused on five questions raised by the assertion of § 437h jurisdiction: (1) whether constitutional issues raised as affirmative defenses are appropriate for certification; (2) whether plaintiffs have statutory standing to raise the issues presented; (3) whether the action presents substantial constitutional questions; (4) whether the action challenges applications of the Act as opposed to facial challenges; and (5) whether the challenges are ripe for judicial consideration.

Thus, in *United States* v. *Clifford*, 409 F. Supp. 1070 (E.D.N.Y. 1976), a criminal prosecution under former 18 U.S.C. § 610, the court rejected the defendant's effort to invoke § 437h for review of constitutional defenses:

> The case at bar was not directed at determining the constitutionality of the Act. Rather this is a criminal action; the constitutional attack was raised by way of motion. There is no need for the expedited review provision of § 437h in a criminal action, since review may be had on appeal.

Id. at 1072.[30]

And in a case strikingly similar to the instant action, the District Court for the District of Columbia recently decided affirmative constitutional defenses in the context of an enforcement action, rather than using the certification procedure of § 437h. *Federal Election Commission* v. *National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed* Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980). In that case, as in the instant case, an injunctive and declara-

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the case *en banc* upon Rule 35(a) of the Federal Rules of Appellate Procedure and upon the statutory enactment of long-standing judicial custom, 28 U.S.C. § 46(c), so as not to foreclose later argument under separation of powers that Congress may not compel a sitting *en banc*, as the plain words of § 437h would imply." 519 F.2d at 902 n. 2. *See* note 19, *supra*.

[29] *See* note 26, *supra*.

[30] *But see* note 21, *supra*.

tory action alleging § 437h jurisdiction was filed shortly after the Commission notified the parties that a civil enforcement action had been authorized. *National Right to Work Committee* v. *Federal Election Commission*, No. 77-786 A (E.D.Va.). The Commission's enforcement action was filed shortly thereafter. *Federal Election Commission* v. *National Right to Work Committee*, No. 77-2175 (D.D.C.). Defendants in that enforcement action raised as defenses the same constitutional challenges raised in their § 437h suit. Thus, the Virginia case was transferred and consolidated with the Commission's action. A comprehensive factual record was then compiled by the parties through extensive discovery. On the basis of that record, the court, after determining the statutory reach, decided the constitutional questions as affirmative defenses without certification under § 437h. Thus, traditional concepts of both constitutional adjudication and appellate review have been preserved through the appropriate judicial review provision of § 437g.

A second focus of federal courts in cases alleging § 437h jurisdiction, concerns statutory standing to invoke the unique provision.[31] The initial decision addressing this issue was *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (per curiam), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (per curiam). The court of appeals concluded:

> As a voter Clark protested no specific veto action taken by the Congress and identified no proposed regulation tainted by the threat of veto on review. *Nor does he suggest that facial provisions of the Act inhibit his political activities as a voter in any way.*

559 F.2d at 647 (emphasis added).

More recently, the United States District Court for the District of Columbia recognized that:

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[31] The express wording of § 437h states that "[t]he . . . Commission, the national committee of any political party, or any individual eligible to vote . . . may institute such actions. . . ."

> [A]ccess to court pursuant to § 437h(a) was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States. . . ."

Martin Tractor, 460 F. Supp. at 1019. The court limited actions ". . . appropriate for vindication in a special declaratory judgment action under § 437h . . . to those filed by eligible voters who put . . . at issue . . . their rights as voters . . . particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue. . . ." *Id.*[32] And, on a motion to intervene, the United States District Court for the Eastern District of New York concluded:

> To construe either of these statutes as granting movants an unconditional right to intervene would require this court to permit *every eligible voter in the United States the same right.* Congress could hardly have contemplated such a result in a statute designed for expedited judicial review.

Republican National Committee v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978) (emphasis added).

Several federal courts have also concluded that only substantial questions need be certified to the *en banc*

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[32] The court of appeals in *Martin Tractor* found it unnecessary to reach the scope or applicability of the standing issue. 627 F.2d at 378. *Cf., Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d at 29, 35 n.11 (adopting a broader interpretation but noting that this was contrary to a finding of the D.C. circuit), *adhered to*, No. 80-1146, slip op. at 6 (7th Cir. Dec. 5, 1980) (*en banc*) (declining to overrule the earlier decision of the panel). In the instant action, the court below simply stated, without analysis, that "[s]tanding and jurisdiction are conferred by, *inter alia*, 2 U.S.C. § 437h(a)." J.S. at A-3. Clearly, neither CMA nor CALPAC fall within the categories named by Congress. Additionally, neither of the named individual plaintiffs put at issue their right to contribute over $5,000 to CALPAC. Rather, the action challenges the asserted right of CMA to contribute over $5,000 to CALPAC.

courts of appeals under § 437h. *Mott*, 494 F. Supp. at 131; *Gifford* v. *Congress*, 452 F. Supp. 802 (E.D. Cal. 1978) (no certification where action frivolous, requiring dismissal under 28 U.S.C. § 1915(d)); *Buckley* v. *Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975). Additionally, § 437h has been held inappropriate for actions challenging Commission interpretations of FECA in the nature of regulations and advisory opinions. *National Conservative Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (1978), *aff'd as modified*, No. 78-1543 (D.C. Cir. March 11, 1980).[33] *See also Mott*, 494 F. Supp. at 135 (initial question of applicability of FECA and regulations inappropriate for court in § 437h action); *Anderson* v. *Federal Election Commission*, No. 80-1664, slip op. at 5 (1st Cir. Oct. 24, 1980).

Finally, federal courts have also generally concluded that a district court is not required by § 437h to certify questions which are not ripe for adjudication. *Martin Tractor*, 627 F.2d at 378 ("nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter"); *Clark* v. *Valeo*, 559 F.2d at 642 (certified questions returned to district court unanswered as case not ripe); *Mott*, 494 F. Supp. at 135 (where allegations so broad as to encompass a spectrum of association and where plaintiff declined to be more specific, a federal court should not pass on constitutional ques-

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[33] The court below concluded that the distinction between facial challenges to the Act and challenges to interpretations or applications of FECA did not avoid difficult constitutional questions but might compound them. J.S. at A-25. However, the court concluded that "an analysis that is facial and yet . . . purports to answer certified questions concerning CMA only is an anomaly." *Id. See also Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir. Dec. 5, 1980) (court rejected the distinction, slip op. at 7-8, but applied a facial analysis, slip op. at 20-22).

tions).[34] *See also Bread Political Action Committee* v. *Federal Election Commission, supra,* slip op. at 21; *Anderson* v. *Federal Election Commission,* No. 80-0272P, slip op. at 6 (D. Me. Oct. 14, 1980).

In sum, the Commission submits that § 437h was improperly employed in the instant action and the *en banc* court was unnecessarily convened. Thus, this Court should dismiss the instant appeal. *See, e.g., Butler* v. *Dexter,* 425 U.S. 262 (1976); *Moody* v. *Flowers,* 387 U.S. 97 (1967); *Public Service Commission* v. *Brashear Freight Lines, Inc.,* 312 U.S. 621 (1941). However, because the district court in *FEC* v. *CMA* awaited the ninth circuit's decision in *CMA* v. *FEC* and because the district court applied that decision with regard to the defenses raised in *FEC* v. *CMA,* the Commission submits that this Court could treat appellants' jurisdictional statement as a petition for *certiorari* and deny the petition. *Certiorari* is specifically authorized as a review procedure in § 437g (a) (9). Viewing appellants' request for review as such would preserve the discretion Congress placed in this Court to review enforcement actions, but would avoid the procedural complexities of vacating the instant case or remanding it to the ninth circuit for consolidation with *FEC* v. *CMA* for any review by this Court that CMA and CALPAC might later seek.

Should the Court determine to entertain this action, for reasons set forth herein and in its Motion to Dismiss the Appeal or in the Alternative to Affirm, the Commission submits that the Court should affirm the appellate court's decision as correctly decided, applying principles established by this Court.

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[34] Indeed, the arguments presented to this Court by *amicus* American Civil Liberties Union merely repeat allegations in *Mott, supra,* deemed by the district court to be so hypothetical as to be unripe for judicial consideration. Amicus ACLU is counsel to plaintiff Mott and, apparently, seeks herein, to circumvent that decision by raising issues that go well beyond the factual and constitutional limitations of the instant action.

II. THE PROVISIONS CHALLENGED BY APPELLANTS VIOLATE NEITHER THE FIRST AMENDMENT NOR THE FIFTH AMENDMENT.

Appellants mount a two-pronged challenge to FECA in an effort to permit CMA, an unincorporated association, to pay without limit for the administration and solicitation expenses of CALPAC. In their first argument, appellants assert that the $5,000 contribution limitation which applies to CMA's payments on CALPAC's behalf violates the first amendment to the Constitution of the United States. In their second argument, appellants assert a violation of the equal protection component of the fifth amendment resulting from the provisions of FECA which regulate corporations and labor organizations, and which exempt from the prohibitions applicable to those organizations payments for the administration and solicitation expenses of a separate segregated political fund.

The court of appeals rejected both of these arguments:

> To accept appellants' constitutional theory would allow associations [like CMA] to channel to any and all political committees, and thence to candidates, unlimited amounts of cash, services, or other things of value. To drive this wedge through the narrow aperture of section 441a would be to shatter the careful design of the Federal Election Campaign Act.

J.S. at A-5. The court below also observed that an "incidental, but nevertheless far-reaching consequence" of appellants' argument would be to grant associations like CMA "a special privilege of unlimited and direct contribution ability, a privilege not extended to individual persons." Id. at A-5 to A-6. With regard to appellants' argument that associations like CMA are disadvantaged vis-a-vis corporations and labor organizations, the court stated:

> The fundamental distinction between the regulatory scheme applied to segregated funds maintained by corporations or unions, on the one hand, and the

> operation of political committees funded by associations on the other, prevents simple comparison between the two. This misapprehension leads to an entirely false issue, *i.e.*, an attempted comparison between these entities. The false comparison cannot be used to declare a major portion of the Act unconstitutional.

Id. at A-22.

The court of appeals was correct in rejecting appellants' arguments. The provisions challenged by appellants violate neither the first nor the fifth amendment.

A. The $5,000 Limit On Contributions To Political Committees, 2 U.S.C. § 441a(a)(1)(A), Is Plainly Within First Amendment Bounds Under The Principles Established By This Court.

Misapplying this Court's analysis in *Buckley*, 424 U.S. at 1, appellants challenge on first amendment grounds FECA's $5,000 limit on contributions to political committees.[35] However, as the court below reasoned, the

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[35] Throughout their pleadings in this case, appellants have obfuscated the parameters of their constitutional challenge by suggesting that the provision of administrative support to a political committee is something less than a contribution within the meaning of the Act. App. Br. at 22. However, the fact that CMA has paid for CALPAC's operating expenses outright, rather than giving CALPAC a monetary contribution which CALPAC in turn could use to pay its operating expenses, does not put CMA's payments outside the definition of "contribution." 2 U.S.C. § 431(8)(A). A gift of "anything of value" plainly describes such in-kind support. This Court implicitly recognized this principle when discussing the analogous situation of defraying expenses for a candidate in connection with a candidate's fundraiser or in connection with travelling on behalf of a candidate. *See Buckley*, 424 U.S. at 36, 37. *See also United States* v. *Chestnut*, 394 F. Supp. 581, 586-587 (S.D.N.Y. 1975), *aff'd* 533 F.2d 40 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976). Indeed, § 431(8)(A)(ii) expressly provides that the payment by any person of compensation for the personal services of another person which are rendered to a political committee is within the meaning of "contribution." *See Federal Election Commission* v. *Committee for a Constitutional Presidency-McCarthy '76*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9074

principles enunciated by this Court in *Buckley* plainly support the conclusion that the provision challenged by appellants is valid under the first amendment.

The $5,000 limit on contributions by persons to political committees, 2 U.S.C. §441a(a)(1)(C),[36] is an integral part of the comprehensive and well-balanced system of contribution limitations chosen by Congress to regulate the influence of money in federal elections.[37] Several of the Act's contribution limitations were challenged in *Buckley*, and were upheld against first amendment attack. Thus, this Court specifically upheld the $1,000 limit on contributions by a person to a candidate and his or her authorized political committees, then 18 U.S.C. § 608(b)(1), 424 U.S. at 23-35; the $5,000 limit on contributions by a multicandidate political committee to a candidate and his or her authorized political committees, then 18 U.S.C. § 608(b)(2), 424 U.S. at 35-36; the limitations on goods and services contributed by individuals rendering volunteer services, then 18 U.S.C. § 591(e)(5)(B), (D), 424 U.S. at 36-37; and the overall $25,000 annual limit imposed on individuals, then 18 U.S.C. § 608(b)(3), 424 U.S. at 38.[38]

(D.D.C. 1979). It would truly undermine the efficacy of the Act's contribution limitations if such in-kind support was not encompassed.

[36] For the definitions of the terms "person", "contribution", and "political committee" as used therein, *see* 2 U.S.C. § 431(11), (8), and (4), respectively.

[37] *See* note 5, *supra*.

[38] This court's analysis in *Buckley* began with the observation, virtually axiomatic, that a major purpose of the first amendment is "to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." 424 U.S. at 14, *citing Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). Further, the Court acknowledged that the first amendment "protects political association as well as political expression." 424 U.S. at 15. Noting that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association," the Court added that "[i]n view of the fundamental nature of the right to associate,

As the court below found, the contribution limitation attacked by appellants herein serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley*. J.S. at A-13 to A-15. The limitation of § 441a(a)(1)(C) is a "proper mechanism" to ensure compliance with the $1,000 limitation on contributions to a candidate. J.S. at A-17. It prevents persons, including associations like CMA, from contributing massive unlimited sums to political committees such as CALPAC, thereby effecting contributions to candidates well beyond $1,000 in amount. In the words of the court below:

> If the limits on payments to a political committee were to be erased, any association could give unlimited funds to a political committee. Donors could in effect use the multicandidate committee as a vehicle for making $5,000 contributions to an unlimited number of candidates and thereby influence, in fact as well as appearance, the use of vast and substantial sums for direct candidate contributions. That would be an egregious distortion of the existing contribution limits of the Act, provisions specifically sustained by the Court in *Buckley*.

J.S. at A-8.

Appellants contend that the court below erred and, without distinguishing this Court's analysis in *Buckley*, assert that "[c]ontributions to political committees are functionally different from contributions to candidates." App. Br. at 8, 22. Clearly, the face of the statute does

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governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'." 424 U.S. at 24, 25, *citing and relying on NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958). Nonetheless, the Court concluded, "[e]ven a 'significant interference' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25, *citing Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

not warrant a different classification for contributions to political committees. 2 U.S.C. § 431(8)(A). In addition to the explicit reference to payments for personal services rendered to a political committee, the phrase "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office" plainly describes a contribution to a political committee. 2 U.S.C. § 431(8)(A)(ii).

Moreover, contrary to appellants' assertion, a contribution to a political committee has all the attributes of a contribution to a candidate or his or her authorized political committee identified by this Court in *Buckley*. Each is a "symbolic expression of support," and each can only result in political expression "by someone other than the contributor." *Buckley*, 424 U.S. at 21. Contributors who relinquish funds to a political committee suggest "a general expression of support" but "do not communicate the underlying basis for the support." *Id.* As with contributions to a candidate, the "quantity of communication" by the contributor to a political committee does not increase perceptibly with the size of his or her contribution. *Id.* Just as those in control of the candidate's campaign organization may convert the contributions received into direct speech, those in control of the political committee may convert the contributions it receives into direct speech.[39]

Appellants nevertheless postulate that because a political committee "*may* make independent expenditures," (emphasis added) which constitutionally are not subject to limitation under the principles of *Buckley*, 424 U.S. at 44-48, contributions to a political committee necessarily take on the attributes, and receive the protections,

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[39] It may also occur that those in control of the political committee decide to convert the contributions received into contributions to other candidates or committees rather than direct speech. Indeed, this seems to be CALPAC's practice. *See* note 40, *infra*. This actually results in CMA's administrative support of CALPAC being even more attenuated as "symbolic speech" than the contributions to candidates which this Court held could be limited.

of such direct expression. App. Br. at 34, 35.[40] As noted above, the transmutation appellants envision is not supported by this Court's ruling in *Buckley*. Indeed, by upholding the limitations on contributions to candidates while striking down the candidate expenditure limitations, the Court in *Buckley* rejected the suggestion that because expenditures could not be limited, the contributions used to make those expenditures could not be limited.

Moreover, as the court below recognized, to the extent that persons contribute to a political committee, which by definition has a "broad and diverse constituency of supporters," their act takes on a "proxy-like character" quite removed from the "core political expression" protected from limitation. J.S. at A-11 n.5. By so delegating control over the disposition of their contribution, persons suffer no more harm to their speech or associational interests if those in control of the political committee make independent expenditures rather than contributions. The situation is clearly analogous to contributing to a candidate's campaign organization which engages in direct speech in the nature of independent expenditures. The act of contributing to a political committee which makes independent expenditures entails no more than a "symbolic expression of support" which does not increase perceptibly with the size of the contribution

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[40] CALPAC, it should be noted, engages in little, if any, independent expenditure activity, and therefore its activities do not fit within the postulated hypothetical. Public reports filed by CALPAC indicate that in the 1977-78 election cycle its receipts totalled $705,755.72 for the period. Of that amount, $26,100 was expended for contributions to federal candidates, while none was spent for independent expenditures on behalf of federal candidates. In the 1979-80 election cycle CALPAC's receipts thus far total $958,369.50, its contributions to federal candidates $900, and its independent expenditures, again, none. The very purpose of securing multicandidate committee status is to enable a committee such as CALPAC to contribute larger amounts to federal candidates. *Compare* 2 U.S.C. § 441a(a)(1)(A) and (2)(A). Thus, CALPAC's emphasis is clearly on making contributions to candidates rather than independent expenditures.

and which results in political expression carried out "by someone other than the contributor." *Buckley*, 424 U.S. at 21.[41]

In addition to misconstruing the nature of a contribution to a political committee by attempting to liken it to direct speech, appellants' argument fails to recognize that the $5,000 limit on such contributions serves the vital governmental interest of preventing corruption and the appearance of corruption in the federal election process. Appellants' argument suggests, without discussion, that it is beyond the power of Congress to prevent circumvention of the limitation on contributions to a candidate. Because the contribution must pass through the political committee before reaching the candidate, appellants contend that the dangers of *quid pro quo* relationships are extinguished. App. Br. at 8, 32, 33.

However, this Court clearly found the governmental interest in preventing evasion of the $1,000 per candidate limitation sufficient to uphold the other contribution limitations challenged in *Buckley*. For example, this Court upheld the limitations on individuals' contributions of certain goods and services in connection with volunteer activities (contributions which would otherwise be completely exempt from the $1,000 per candidate limit) on the ground that they "foreclose[d] an avenue of abuse." *Buckley*, 424 U.S. at 37. The Court also upheld the $25,000 annual limitation placed on individuals' contributions, whether to candidates or political committees:

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[41] It does not suffice to label contributions to political committees as a third category, "donations." App. Br. at 23 n.19, *citing* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 Yale L.J. 953 (1977). A contributor who relinquishes control over his or her funds to a political committee is engaging in the same type of speech and associational act as a contributor to a candidate's campaign organization. In both situations, the contributor selects the recipient whom the contributor hopes will express his or her own views and does so in the belief that a contribution may be the most effective way to engage in political activity.

> This quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

Id. at 38.

Congress explicitly stated that the purpose of the $5,000 limit was, *inter alia*, to prevent evasion of the per candidate limitations:

> The conferee's decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or a multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate;* second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 57 (1976) (emphasis added). Congress thus recognized the potential for abusing the limitation on contributions to candidates if a person could contribute massive sums to political committees likely to support a candidate. With each committee able to contribute $1,000 (or $5,000 if a multicandidate committee such as CALPAC) a person easily could effect contributions to a candidate well in

excess of the $1,000 limit for direct contributions. This problem could occur most readily in the case of persons like CMA which are not subject to the overall $25,000 annual limitation. By restricting the amount that such persons may give to a political committee to $5,000 per calendar year, the opportunity for indirectly effecting additional large contributions to candidates is reduced.[42]

Appellants essentially disagree with Congress's judgment that the $5,000 contribution limitation is a necessary and proper mechanism to prevent circumvention of the per candidate limitations. Their argument that Congress should have left persons free to contribute without limit to political committees because the committees themselves are limited in the amount they may contribute to candidates, App. Br. at 33, 34, ignores the realities of the contribution process and the means that can be employed to funnel large contributions to candidates. A person with large sums to contribute, such as CMA, would not require a great deal of political sophistication to channel large contributions to political committees likely to contribute to a particular candidate.[43]

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[42] This interest alone is sufficient to sustain the limitation. The additional reasons cited by Congress are also significant, however. For example, restricting the amount which political committees may receive from a particular person ensures that the disclosure reports filed by the ultimate recipient of contributions accurately reflect the root source of the funds received. Indeed, this Court found that disclosure of the root source of contributions served substantial interests as a means for the public to evaluate candidates. *Buckley*, 424 U.S. at 66, 67, 72.

[43] Local and state political party committees, for example, would offer an obvious avenue for such contributions. Such committees are within the meaning of "any other political committee" as used in 2 U.S.C. § 441a(a)(1)(C). For persons with more political sophistication, of course, the pool of political committees which could be used to effect contributions to a particular candidate is greatly expanded. Appellants themselves note the dramatic rise in the number of political action committees in recent years. App. Br. at 25 n.22, 27 n.60. Because the reports of political committees' contribution practices are publicly available, *see* 2 U.S.C. §§ 432(g), 434, 439, there is easy access to the type of information which could

As Congress clearly concluded, the other provisions of the statute which help prevent evasion of the per candidate limitations are not adequate by themselves to stem the flow of dollars into candidate coffers through the simple device of contributing to political committees likely to contribute to particular candidates. Thus, although the statute attributes as contributions to a candidate those payments made to the candidate's authorized committee, § 441a(a)(7)(A), those payments made in cooperation or in concert with the candidate, § 441a(a)(7)(B)(i), those payments made to republish or disseminate materials produced by a candidate, § 441a(a)(7)(B)(ii), and those payments "earmarked" for a particular candidate, § 441a(a)(8), none of these provisions covers the making of an unearmarked, uncoordinated contribution to a political committee likely to contribute to a preferred candidate.[44] As the court below observed:

> It is quite plausible that the difficulty of tracing funneling to candidates, especially by tacit arrangements falling short of coordination, is sufficiently great that a preventive limitation is required in the form of an absolute dollar ceiling on the ability of "persons" (including associations) to contribute to political action committees (which might then "funnel" excessively to candidates).

J.S. at A-10.

Appellants' first amendment argument thus founders because the speech and associational interest of contributors to political committees, and the governmental inter-

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lead one to select political committees likely to support a preferred candidate.

[44] Through its regulations, the Commission has made an effort to make effective these other measures which also help prevent evasion of the per candidate limitation. *See* 11 C.F.R. §§ 110.6(b), 110.1(h). However, these provisions do not reach all the situations which only an across-the-board per committee limitation can reach. Even without a "designation, instruction, or incumbrance" or without retaining "control over the funds" a person can, with relative ease, still effect contributions to a candidate by giving to political committees likely to support the candidate.

est in preventing corruption or the appearance of corruption are the same as those analyzed in *Buckley*. Like the contribution limitations upheld in *Buckley*, § 441a(a)(1)(C) "entails only a marginal restriction on the contributor's ability to engage in free communication," 424 U.S. at 20, and furthers the "weighty interests" already found sufficient by this Court. J.S. at A-10.

Even with § 441a(a)(1)(C) intact, the statutory scheme provides substantial freedom for CMA, CALPAC, and their members to engage in political speech and association. CMA, as a "person" under 2 U.S.C. § 441a(a)(1), may contribute $1,000 per election to as many candidates as it chooses, may contribute $5,000 per year to CALPAC and as many other political committees as it chooses, and may contribute $20,000 per year to the national party committees. Moreover, CMA may make unlimited expenditures independent of any candidate as a result of this Court's ruling in *Buckley*, 424 U.S. at 44-48. CALPAC, as a multicandidate political committee under 2 U.S.C. § 441a(a)(2), may contribute $5,000 per election to as many candidates as it chooses, $5,000 per year to as many political committees as it chooses, and $15,000 per year to the national party committees. The $5,000 limit on contributions to CALPAC does not limit the overall amount which CALPAC may receive to make contributions or independent expenditures, and there is no record showing that the limit of § 441a(a)(1)(C) has had a "dramatic adverse effect" on CALPAC's fundraising abilities.[45]

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[45] In response to concerns that the limitations on contributions dealt with in *Buckley* would preclude candidates and political committees from amassing the resources necessary for effective advocacy, this Court stated:

> There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who

Even more significant to the speech and associational interests of CMA's and CALPAC's members is the fact that, as individuals, they each may contribute $1,000 to candidates, $5,000 to political committees, and $20,000 to national party committees. Appellants have not and cannot construct a persuasive argument that the speech and associational interests of CMA's and CALPAC's members are impermissibly burdened by the $5,000 limit on CMA's contribution to CALPAC, when in fact each and every member of CMA and CALPAC may make gifts of up to $5,000 to CALPAC.

Appellants give no justification for assuming that CMA's members may exercise their political associational rights only through CMA's support of CALPAC instead of through individual, direct contributions to CALPAC. Based upon the membership figures supplied by appellants and the findings of the district court in the related enforcement case, each of CMA's 25,000 members would have had to contribute only slightly more than $5 to fund CMA's administrative support of CALPAC in 1978, which totalled $134,981. App. Br. at 47 n.61, A-2, A-3. It is hardly convincing to argue that because the contributions would be used for operating costs rather than for direct candidate contributions, the contributors would be reluctant to give this sum to CALPAC. App. Br. at 35. The amount is not overbearing, and such contributors surely would be aware that every political committee must incur operating costs in order to carry out its functions.

Even assuming that CMA's members prefer to have CMA collect funds from them and then pay for CALPAC expenses, the statute does not require that practice. To the contrary, the statute allows CMA's members to fund CALPAC up to the amount of $5,000 per member. Certainly, the minimal restriction of § 441a(a)(1)(C) does

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would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21, 22 (footnote omitted).

not prevent CMA's and CALPAC's members from exercising this right.

B. The Provisions Of FECA Which Separately Regulate Corporations And Labor Organizations Do Not Invidiously Discriminate Against Unincorporated Associations.

Appellants next attack 2 U.S.C. § 441b(b)(2)(C) and 2 U.S.C. § 431(8)(B)(vi), which allow a corporation or labor organization to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund. Appellants argue that these provisions are unconstitutional under the equal protection component of the fifth amendment. App. Br. at 40-49. In effect, CMA and CALPAC attack the longstanding treatment of corporations and labor organizations as a separate classification under 2 U.S.C. § 441b and its predecessor provisions.[46] Throughout their argument alleging unequal treatment, appellants ignore the fact that corporations and labor organizations, unlike unincorporated associations, may not, consistent with FECA, make contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a).[47] Section 441b(b)(2)(C), the provision challenged, is but a narrow exception to that prohibition. What appellants present as an argument for unin-

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[46] Numerous federal courts have held the prohibition constitutional in the context of specific cases. *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir., Dec. 5, 1980) (en banc); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D.Pa. 1916).

[47] *See* note 5, *supra*.

corporated associations having the same status as corporations and labor organizations, is in fact an argument for preferred status. That is, appellants would allow unincorporated associations to make unlimited payments for the administration of political committees without simultaneously prohibiting their other contributions or expenditures and without imposing restrictions on the scope and methods of their solicitations.[48]

As the court below observed, however, the fundamentally distinct regulatory scheme applied to corporations and labor organizations prevents any simple comparison between them on the one hand, and unincorporated associations on the other. J.S. at A-21 to A-24. Consequently, "[n]o constitutional discrimination or first amendment burden or injury can be demonstrated from the differential treatment." *Id.* at A-23, A-24.

This Court has stated that the act of classifying does not itself deprive anyone of equal protection of the laws. *See, e.g., Carrington* v. *Rash*, 380 U.S. 89, 92 (1965), *relying on Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955), *reh. denied*, 349 U.S. 925 (1955). Since all legislation involves some degree of classification, the Court has upheld federal statutes which establish reasonable classifications. *Buckley*, 424 U.S. at 93-108; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), *reh. denied*, 420 U.S. 966 (1975); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 562-568 (1939).[49]

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[48] Appellants offer no definition for the "associations" that would gain this preferred status. They disregard, therefore, the difficulty of distinguishing between a *bona fide* association and individuals merely labeling themselves as such for the purpose of taking advantage of this new exception to FECA's contribution limitations.

[49] The concept of equal protection means that laws must apply alike "to all in the same situation." *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 412 (1910). However, corporations and labor organizations long have been treated as special creatures of the law. Corporations are recognized as separate and distinct legal entities subject to a unique body of law. *Dartmouth College* v. *Woodward*, 17 U.S. 250, 303 (4 Wheat. 518, 636) (1819); *Wilson* v. *United*

The legislative history of 2 U.S.C. § 441b demonstrates that Congress had a rational basis for, and indeed a compelling interest in, separately limiting the political contributions and expenditures by corporations and labor organizations. The first congressional effort in this area was directed only at corporations.[50] The Act of January 26, 1907 (the Tillman Act), 34 Stat. 864, prohibited corporations from making "a money contribution in connection with" any federal election. This Act was spawned by specific instances of abuse by corporations, particularly during the 1904 presidential elections. *UAW*, 352 U.S. at 570-575 (citing extensive legislative history).

In 1925, with passage of the Federal Corrupt Practices Act, 43 Stat. 1070, Congress undertook a comprehensive revision of existing election legislation which by then also included reporting requirements and candidate con-

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States, 221 U.S. 361 (1911); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Labor unions too have been recognized as separate functioning institutions. *United States* v. *White*, 322 U.S. 694, 703 (1944); *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922).

Where Congress has wished to treat corporations and unincorporated associations alike, it has expressly so provided. *See, e.g.*, 26 U.S.C. § 7701(a)(3) and *Morissey* v. *Commissioner of Internal Revenue*, 296 U.S. 344 (1935) (trust held to be association within meaning of § 7701's definition of "corporation"). On the other hand, where Congress has wished to treat corporations differently than unincorporated associations, this Court has approved the distinction on grounds of "certainty of application" and deference to the legislature. *United Steelworkers of America, AFL-CIO* v. *R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (labor union not treated as corporation for diversity jurisdiction purposes). *See also Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 546-547 (1922); *Mallinckrodt Chemical Works* v. *Missouri*, 238 U.S. 41, 55-56 (1915); 28 U.S.C. § 1332(c).

[50] The evolution of 2 U.S.C. § 441b is set forth, through the 1971 legislation, in *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972) (*"Pipefitters"*); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948) (*"CIO"*); and *United States* v. *International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America*, 352 U.S. 567 (1957) (*"UAW"*).

tribution and expenditure limitations. As part of the 1925 revision, the ban on corporate contributions was strengthened by changing the phrase "money contribution" to the broader term "contribution." Express provision was made for penalizing the recipient of a forbidden corporate contribution, as well as the contributor. *UAW*, 352 U.S. at 576, 577; *CIO*, 335 U.S. at 113, 114.

In 1943, Congress extended the statute's coverage to labor organizations for the duration of World War II. War Labor Disputes Act of 1943 (Smith-Connally Act), 57 Stat. 163. As this Court recounted in *UAW*, 352 U.S. at 578:

> The need for unprecedented economic mobilization propelled by World War II enormously stimulated the power of organized labor and soon aroused consciousness of its power outside its ranks. . . . And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pushing a similar course, and with the same untoward consequences for the democratic process.

Subsequent massive contributions and expenditures by labor unions during the 1944 national elections brought about the permanent prohibition of contributions by labor organizations under the Labor Management Relations Act (Taft-Hartley Act) of 1947, 61 Stat. 159. *UAW*, 352 U.S. at 578-584; *Pipefitters*, 407 U.S. at 403-405. The 1947 legislation also added the term "expenditure" to the overall prohibition and extended coverage to primary elections.

Thus, by 1947 the scope of the statute was virtually the same as it is today. Codified at 18 U.S.C. § 610, it read in pertinent part:

> It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary elec-

> tion or political convention or caucus held to select candidates for any of the foregoing offices. . . .

Only corporations and labor organizations were within its coverage.

The next major reassessment of federal election law came in 1971 with the passage of the Federal Election Campaign Act of 1971, *supra*. This Act repealed the existing candidate and committee contribution and expenditure limitations and imposed in their place certain broadcast communication expenditure limitations and a comprehensive reporting system for federal candidates and their committees. In addition, in what became known as the Hansen amendment, Congress added a definition for "contribution or expenditure" including those provisions now codified at 2 U.S.C. § 441b(b)(2)(A), (B), and (C). *See Pipefitters*, 407 U.S. at 409-412, 421-427, 429-432.[51]

The Federal Election Campaign Act Amendments of 1974, *supra*, reimposed limitations on the amount which individuals and political committees could contribute to candidates ($1,000 and $5,000 per election, respectively) and on the amount which individuals could contribute overall in a calendar year ($25,000). Independent expenditures on behalf of a candidate were limited ($1,000 per year) and candidates themselves were limited in the amounts they could spend in their campaigns. Congress also exempted from the reporting provisions and the independent expenditure limitations those expenditures already exempted by then 18 U.S.C. § 610(b). 2 U.S.C. § 431(e)(5)(F), (f)(4)(H) (1975) and 18 U.S.C. § 608(e)(2)(B) (1975), quoted in *Buckley*, 424 U.S. at 147, 149, 194.

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[51] Appellants equivocally suggest that the exemption from then § 610 pertaining to payments for the establishment, administration, and solicitation expenses of a separate segregated fund "may be constitutionally required by [*Pipefitters*]." App. Br. at 43. However, appellants provide no support for this supposition. In fact, this Court in *Pipefitters* only held that the exemption of § 441b(b)(2)(C) may have made lawful what was previously unlawful and that the petitioners remained punishable under the

In 1976, after this Court's decision in *Buckley*, Congress once again made several changes in the Act. As one of those changes, Congress added the $5,000 limitation on the amount persons or multicandidate committees could contribute to political committees. 2 U.S.C. § 441a (a) (1) (C), (2) (C). At that time Congress also amended then 18 U.S.C. § 610 to clarify the respective rights of corporations and labor organizations and to move the statute's prohibitions from the criminal code to its present location at 2 U.S.C. § 441b.

As the foregoing legislative history indicates, Congress has long considered large-scale election activity by corporations and labor organizations to pose special problems. Congress concluded first that corporations', and later that labor organizations', aggregations of wealth presented such disruptive power and influence in connection with federal elections that prohibitions on contributions and expenditures were justified. Congress's conclusion that certain exceptions should be allowed for specified communications and non-partisan activities and for the administration of separate segregated political funds does not negate the underlying rationale of the classification.

In its efforts to reform the political process by imposing tightly drawn restrictions on corporations and labor organizations, Congress has not committed constitutional error by not treating individuals or other organizations in the same manner.[52] Indeed, Congress

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previous existing statute. 407 U.S. at 428-435. The Court specifically stated that its disposition of the case (reversal due to faulty jury instructions and remand to the district court for further proceedings) "makes decision of the constitutional issues premature, and we therefore do not decide them." *Id.* at 400. The constitutionality of § 441b has never been decided by this Court. *See CIO*, 335 U.S. at 121-124; *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 n.26 (1978). However, every lower court that has addressed its provisions has upheld their constitutionality. See note 46, *supra*.

[52] Recently the United States Court of Appeals for the Seventh Circuit upheld the distinction made in 2 U.S.C. § 441b(b) (4) between corporations and labor organizations, on the one hand, and

might well have concluded that all organizations posed such a similar threat of abuse that they should all fall within the same restrictions as corporations and labor organizations.[53] Congress, however, did not. The constitution does not require that Congress place unincorporated associations within the narrow exemption of

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incorporated trade associations on the other. *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir. 1980). The Court observed:

> [T]he somewhat dissimilar treatment of corporations, labor organizations, membership organizations and trade associations under Section 441b(b)(4) follows from the rather obvious facts that each of the different groups has a different structure and different kind of constituency and that each requires somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the Fifth Amendment's equal protection provision. *See Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99.

Id., slip op. at 16, 17. Thus, different treatment even within the prohibition of § 441b has been upheld.

[53] Appellants place reliance on this Court's holding in *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 765, apparently for the proposition that Congress cannot differentially regulate corporations and labor organizations on the one hand, and unincorporated associations on the other. App. Br. at 48. To the contrary, *Bellotti* rejected the approach suggested by appellants herein. *Id.* at 775-6. The Court's analysis in *Bellotti* was to protect society's interest in receiving information, regardless of the source of the information, at least in the absence of a demonstration that regulation of the source itself served a substantial governmental interest. Moreover, as the court below in this case observed:

> Any suggestion that our approval of the different regulatory mechanisms used in the case of corporations, and labor unions, on the one hand, and associations, on the other, is the same as the impermissible "differential muffling" that was disapproved in *First National Bank, supra*, 435 U.S. at 788-92, rests on an inapposite analogy between the issues and holdings in that case and ours.

J.S. at A-24 n.13.

§ 441b(b)(2)(C), where such associations are not restricted by § 441b in the first place but instead are regulated by the contribution limitations of § 441a, along with individuals, political committees, and other "persons." [54]

Additionally, this case does not present, as appellants assert, a situation where a statute restricts one class of persons to enhance the relative voice of others. App. Br. at 49. Here the statute restricts one class of persons (corporations and labor organizations) in order to avoid particular abuses—the influence in federal elections of those controlling large aggregations of capital and the use of funds for political purposes without the consent of the minority. *See Cort* v. *Ash*, 422 U.S. 66, 80-82 (1975). The statute also restricts another class of persons (individuals, partnerships, political committees and unincorporated associations) because they may cause another type of abuse—corruption or the appearance of corruption through circumvention of the $1,000 limit on contributions to candidates. *See Buckley*, 424 U.S. at 25-27; H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 57-58 (1976). No one class is being disadvantaged in order to give a greater advantage to another class. *Cf. Buckley*, 424 U.S. at 48, 49.

Appellants are not harmed by the Act's classifications, as the court below observed. J.S. at A-23. Because CMA is unincorporated and thus not limited by the prohibitions of § 441b, it is allowed to contribute to political candidates and committees, to make independent expendi-

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[54] It should be noted that even the dissenting judges in the court below did not believe that the exemption of § 441b(b)(2)(C) is constitutionally underinclusive by not including unincorporated associations. Rather, they would have found § 441a(a)(1)(C) constitutionally underinclusive because it does not include the payments made by corporations and labor organizations for the administration of their separate segregated political funds. J.S. at A-70, A-71. The latter conclusion, of course, disregards the impact of the other restrictions that apply to corporations and labor organizations and the careful judgment that Congress has made in allowing only certain confined exemptions for these organizations.

tures on behalf of candidates, to make partisan communications beyond its own membership, and to solicit not only its own members and employees, but also anyone else it chooses for contributions for political purposes.[55] Corporations and labor organizations, on the other hand, can make neither contributions nor expenditures in connection with federal elections. Partisan communications by corporations and labor organizations and voter registration and get-out-the-vote activities may not extend beyond the stockholders, executive and administrative personnel, members, and their families. Solicitations for contributions to a corporation's or labor organization's separate segregated fund are specifically restricted by the statute in terms of who may be solicited and when and how they may be solicited. 2 U.S.C. § 441b(b)(3), (4).

Appellants argue that constitutionally Congress must permit all associations the benefit of an exception to a broad prohibition directed only at corporations and labor organizations. But, appellants do not argue that the concomitants of the broad prohibition—the denial of a right to make direct contributions to candidates or committees or independent expenditures on behalf of candidates or to solicit contributions freely—also should extend to all associations. By this attack, appellants seek to establish as a matter of constitutional law the proposition that the exception is greater than the prohibition; that because the exception allows to corporations and labor organizations a particular activity as part of a

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[55] Appellants suggest that it is not a significant benefit for CMA to be able to solicit anyone it chooses. App. Br. at 46. It is pure conjecture, however, to assume that CMA could not benefit from soliciting beyond its membership. Related health professions and persons associated with the medical field presumably would provide a lucrative body of solicitees. In addition, appellants imply that if CMA were to contribute to candidates, its members would resign. App. Br. at 46 n.59. However, CMA spent a total of $318,833 between May 11, 1976, and December 31, 1978, to enable CALPAC to make contributions to candidates, and yet CMA has not demonstrated any resulting loss of members.

comprehensive regulation, that activity must be extended as a right of all associations. However, the statutory scheme created by Congress, by setting its present balance, has met the constitutional requirements of due process.

CONCLUSION

This Court should dismiss this case as an improper appeal under § 437h, and, treating appellants' jurisdictional statement as a petition for *certiorari*, either deny the petition or affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

REPLY BRIEF OF APPELLANTS

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No. 79-1952

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REPLY BRIEF OF APPELLANTS

ARGUMENT

I

APPELLEES HAVE FAILED TO SHOW THAT THIS CASE WAS IMPROPERLY CERTIFIED UNDER 2 U.S.C. SECTION 437h(a) OR THAT THIS COURT LACKS JURISDICTION UNDER SECTION 437h(b)

Section 437h is a unique judicial review provision, *Clark v. Valeo,* 559 F.2d 642, 645 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977), enacted for the purpose of allowing prompt judiciai review of con-

stitutional challenges to the Act, and specifically to provide for ". . . comprehensive review, speedy review and ultimate review . . ." by the Supreme Court, *Bread Political Action Committee v. Federal Election Commission,* 591 F.2d 29, 33 (7th Cir. 1979). The Commission argues that this provision must be narrowly construed, that the district court erred in certifying this case to the court of appeals and that this appeal was improperly taken. The Commission's arguments would abrogate meaningful jurisdiction under § 437h.

A. Jurisdiction Under Section 437h Is Not Limited to Questions Pending During the Congressional Debate on the 1974 Amendments

The Commission seems to argue that jurisdiction under § 437h is limited to consideration of constitutional questions regarding the Federal Election Campaign Act Amendments of 1974.[1] The plain language of the statute, which states in pertinent part that "[t]he district court immediately shall certify all questions of constitutionality of this Act . . ." is obviously inconsistent with the Commission's interpretation. As discussed in *Bread PAC v. FEC,* 591 F.2d at 30-34, § 437h(a) requires the district court to "certify *all* questions of constitutionality of this Act . . ." (emphasis added) to the court of appeals sitting en banc. This language demonstrates Congress' intent that questions in addition to the specific issues which the 93rd Congress may have considered be certified. The direction to certify all constitutional questions shows that Congress intended the unique review procedures to apply broadly to challenges to the Act. *Id.* at 31.

In addition to the decision below by the district court, constitutional questions have been certified under § 437h in several instances despite the lack of any articulated con-

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[1]P.L. No. 93-443, 88 Stat. 1263 (1974).

nection with the Congressional debate of the Federal Election Campaign Act Amendments of 1974.[2] These authorities furnish a broad spectrum of judicial opinion for the proposition that § 437h extends beyond questions specifically considered during deliberation of the 1974 Amendments.

Section 437h was amended by both the 1976 Amendments and the 1979 Amendments.[3] In both instances the amendments were non-substantive. In the absence of a "sunset provision," or specific words of limitation in the statute, Congress' failure to curtail jurisdiction under § 437h in subsequent amendments further demonstrates that jurisdiction under this section is broader than that envisioned by the Commission and is not limited by the concerns expressed by Senator Buckley or others during debate on the 1974 Amendments.

B. The Exercise of Jurisdiction Under Section 437h Does Not Disrupt Enforcement Proceedings

The Commission argues that no jurisdiction can exist under § 437h since the parties to this action are also respondents in an enforcement proceeding. This interpretation of the Act would foreclose jurisdiction under § 437h whenever the process specified in 2 U.S.C. § 437g has commenced.

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[2] *E.g., Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977) (dismissed on ripeness grounds); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (questions certified *sua sponte* after they had been raised as a defense); *Republican Nat. Committee v. Federal Election Commission*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 100 S.Ct. 1639 (1980); *Federal Election Commission v. Lance*, 617 F.2d 325 (5th Cir. 1980) (constitutional questions certified *sua sponte* by three-judge panel of court of appeals on appeal from subpoena enforcement proceeding).

[3] P.L. 94-283, 90 Stat. 496; P.L. 96-187, 93 Stat. 1366.

Nothing in the language of the Act compels this result. This interpretation allows the unique judicial review provisions of § 437h be cut off in midstream, or be made unavailable to parties most likely to avail themselves of these provisions. The right of prompt, comprehensive review provided by § 437h should not be contingent on the FEC's decision to commence an enforcement proceeding.

The Commission argues an absence of any legislative history to show that a respondent in an enforcement proceeding under § 437g should be entitled to the unique judicial review provision set forth in § 437h. This ignores the clear language of both § 437h and § 437g. Statutory interpretation begins with the language of the statute. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197, 201 (1976). Although discussing the distinction between enforcement and vindication of constitutional rights in a declaratory relief action, the Commission fails to acknowledge the significance of this distinction. By creating a special judicial review provision for constitutional questions, Congress showed the need for comprehensive review, speedy review and ultimate review by this Court of all constitutional questions involving the Act. *Bread PAC v. FEC,* 519 F.2d at 33.[4] By glossing over the distinction between an

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[4]*See Common Cause v. Schmitt,* No. C80-1609, *Federal Election Commission v. Americans For Change,* No. C80-1754 (D.D.C. September 30, 1980) (consolidated opinion) (three-judge court), Brief of Appellants at A-18, where the court interpreted the Presidential Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* The Court found that § 9011(b)(2), a provision analogous to § 437h, required expeditious judicial review of questions involving the implementation or construction of the Fund Act ". . . because elections come up fast and candidates, whoever they turn out to be, and others, need to know what and how the elections laws apply, and how much they provide (footnote omitted). So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubt-

enforcement proceeding and an action involving the constitutionality of the Act, the Commission ignores the obvious distinction between a proceeding whose import may be limited to the parties directly involved and the constitutionality of the provisions of the Act which may have wide-ranging impact. *See California Medical Ass'n v. Federal Election Commission,* No. 79-4426 (9th Cir. May 23, 1980). J.S. at A-41, CCH at 51,001 (Wallace, J. concurring and dissenting).

The Commission does not show how the present action has in any way impeded the progress of the enforcement action entitled *Federal Election Commission v. California Medical Ass'n,* No. C-79-1197-WHO (N.D. Cal., judgment entered December 10, 1980). The Commission argues, Brief for Appellees at 13-14, that the exercise of jurisdiction under § 437h in the present matter allows appellants to circumvent the procedures for judicial review established by § 437g. It is unclear precisely how this has or will occur. The enforcement action was originally filed May 22, 1979, and proceeded to trial as originally scheduled by the district court on March 17-18, 1980. A decision was rendered in an opinion filed October 21, 1980. Brief of Appellants at A-1. Judgment has now been entered on that opinion. While implying that the filing of an action under § 437h was somehow an invidious attempt to avoid enforcement, nowhere does the Commission demonstrate that the enforcement action was in any way inhibited.

The Commission incorrectly argues that the judicial system was burdened with two separate actions involving the same parties. This ignores the fact that appellants Foster and Rose were not parties to the enforcement proceeding. As plaintiffs specifically enumerated in the first

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ful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates." Brief of Appellants at A-45.

sentence of § 437h(a) they have a separate statutory grant of standing to sue. *CMA v. FEC,* J.S. at A-45, CCH at 51,003 (Wallace, J. concurring and dissenting). The Commission also wrongfully argues that because appellants filed an action under § 437h they have "successfully avoided" review of affirmative defenses raised in the enforcement proceeding. It is self-evident these defenses were not raised by appellants in the enforcement proceeding so that their disposition could be avoided, although the district court properly refused to address these defenses given the prior dispositive ruling by the Ninth Circuit. See, *FEC v. CMA,* Brief of Appellants at A-5. Because of the prior ruling by the Ninth Circuit, the district court was relieved of the task of rendering an opinion on constitutional questions raised in the present matter which were also alleged as affirmative defenses in the enforcement proceeding.

It is ironic that the Commission now complains about the favorable ruling on the merits in the Ninth Circuit which, if sustained by this Court, would dispose of the affirmative constitutional defenses raised by CMA and CALPAC in the enforcement proceeding. Authoritative disposition of these questions would benefit all parties. Like an interlocutory appeal under 28 U.S.C. § 1292(b), the resolution of important issues will result in certain judicial economies to the parties. The Commission's criticism that it is constrained by the administrative procedures set forth in § 437g which are required before an enforcement action may be filed is also plainly wrong. The first sentence of § 437h(a) specifically states that the Commission may avail itself of § 437h and institute declaratory relief actions to construe the constitutionality of the Act. Clearly, if a particular provision requires authoritative adjudication the FEC has a statutory grant of standing to file the appropriate action under § 437h.

It is not appellants' construction of § 437h which is contrary to traditional principles of constitutional adjudication. Instead, Congress has made a determination that speedy, comprehensive and authoritative disposition should be made of constitutional questions regarding provisions of the Act. *E.g., Bread PAC,* 591 F.2d at 33. The federal courts have demonstrated their ability to limit actions brought under § 437h so as to avoid giving advisory opinions. *E.g., Clark v. Valeo,* 559 F.2d at 646-650; *Mott v. Federal Election Commission,* 494 F.Supp. 131 (D.D.C. 1980), *appeal docketed* No. 80-1949 (D.C. Cir. August 12, 1980); *Gifford v. Congress,* 452 F.Supp. 802 (E.D. Cal. 1978).

The Commission also argues that§ 437h should not be expanded to encompass affirmative defenses in an enforcement action. This issue is not before the Court as this matter comes to the Court in a proceeding originally brought under § 437h as opposed to an affirmative defense in an enforcement proceeding certified pursuant to § 437h. The Commission complains that the district court's decision in *FEC v. CMA* will cause the Ninth Circuit to be confronted with the same controversy although limited to non-constitutional issues.[5] It is presumptuous for the Commission to conclude at this time that the district court decision in *FEC v. CMA* does not involve other constitutional questions, or that non-constitutional issues which might be raised on appeal would not be appropriate for appellate review. It makes no sense to argue that merely because the Ninth Circuit has answered certain constitutional questions it would therefore be inappropriate to address other issues arising out of the separate enforcement proceedings. The argument that the duplication of

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[5]CMA and CALPAC filed a notice of appeal in *FEC v. CMA* on December 18, 1980.

judicial efforts could be avoided if jurisdiction was not exercised under § 437h is plainly wrong, since at some point both the district court, and possibly the court of appeals, would be required to deal with issues outside the scope of § 437h in the enforcement proceeding.

C. None of the Authorities Cited by the Commission Require the Narrow Construction of Section 437h Urged by the Commission

The Commission cites several cases, none of which are apposite, for the proposition that § 437h should be narrowly construed in this instance. This is not a criminal action like *United States v. Clifford*, 409 F.Supp. 1070 (E.D.N.Y. 1976). The fact that the parties in *Federal Election Commission v. National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed* Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980) failed to move to certify constitutional questions is not controlling here. The Commission can hardly now complain that *CMA v. FEC* and *FEC v. CMA* were not consolidated, having itself neglected to make a motion to consolidate in either proceeding. The inference that the preparation of a comprehensive record would have assisted the court of appeals in disposing of the present matter is insufficient to defeat jurisdiction. Had the Ninth Circuit felt that additional facts were necessary before it could render a decision, it could have remanded for fact-finding. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 9-10 (1976); *Republican Nat. Committee v. Federal Election Commission*, 616 F.2d 1 (2d Cir. 1980), *aff'd*, 100 S.Ct. 1639 (1980).

Clearly, CMA and CALPAC are parties with the requisite personal stake to meet the standing requirements of article III. Appellants Foster and Rose fall within the statutory grant of standing contained in § 437h(a), and have the requisite interest as members of CMA and CAL-

PAC to meet the requirements of article III. *CMA v. FEC*, J.S. at A-45, CCH at 51,003 (Wallace, J. concurring and dissenting). Limitations on standing to proceed under § 437h advanced by *Martin Tractor Co. v. Federal Election Commission*, 460 F.Supp. 107 (D.D.C. 1978), *aff'd* 627 F.2d 375 (D.C. Cir. 1980), *cert. denied sub nom. National Chamber Alliance for Politics v. Federal Election Commission*, ... U.S. ....., 49 U.S.L.W. 3332 (1980) are contrary to *Buckley v. Valeo*, 424 U.S. at 11-12, and two rulings by the Seventh Circuit in *Bread PAC v. FEC*, 591 F.2d at 31 and *Bread Political Action Commission v. Federal Election Commission*, No. 80-1146 (December 5, 1980) (en banc), slip op. at 6-8, *citing CMA v. FEC*. Furthermore, it should be obvious that the present matter presents a controversy ripe for adjudication, particularly in light of the enforcement action subsequently filed by the Commission.[6]

In summary, the district court properly certified this case to the Ninth Circuit pursuant to § 437h(a). The Ninth Circuit had jurisdiction to render its decision and this appeal is properly before this Court pursuant to § 437h(b). This Court should exercise jurisdiction.

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[6]The arguments by Common Cause that plaintiffs in an action brought under § 437h must also show irreparable harm and the inadequacy of legal remedies is inconsistent with the implied findings by the majority below and Judge Wallace's discussion of prudential considerations. Relying on the statement by this Court in *Buckley* that jurisdiction exists to the extent permitted by article III, Judge Wallace concluded that prudential considerations do not apply. *CMA v. FEC*, J.S. at A-44, CCH at 51,002.

The argument that an enforcement proceeding may obviate the need for bringing an action under § 437h ignores the fact that the parties which may invoke § 437h will not know until after that proceeding is concluded whether the more comprehensive review available under § 437h should have been sought. This approach also ignores the res judicata effect of a ruling under § 437g and the resultant foreclosure of meaningful review under § 437h.

II

APPELLEES HAVE FAILED TO SHOW THAT THE LIMIT ON SUPPORT FOR A POLITICAL COMMITTEE ESTABLISHED BY SECTION 441a(a)(1)(C) IS CONSISTENT WITH THE FIRST AMENDMENT OR THE FIFTH AMENDMENT

In arguing that the $5,000 limit established by § 441a(a)(1)(C) is valid, the Commission emphasizes statements made by the majority below regarding the supposed abuses which would occur if unlimited amounts of cash could be contributed to a political committee. While appellants agree with the analysis by Judge Wallace in his concurring and dissenting opinion that would invalidate § 441a(a)(1)(C) entirely, J.S. at A-52-A-72, CCH at 51,005-51,012, it is important to repeat that this challenge was not brought for the purpose of allowing unlimited cash support for a political committee, but instead is directed at relieving unincorporated associations and their political committees from the $5,000 limit on administrative support. Accordingly, the discussion which follows will focus on the relevant arguments as they concern administrative support.

A. The $5,000 Limit on Contributions of Administrative Support by an Unincorporated Association to Its Political Committees Violates the First Amendment

In analyzing the *Buckley* decision, Judge Wallace found that a limitation on contributions to political committees can only be sustained if the governmental interest outweighs the impact on group and individual speech and associational freedoms, and a restriction of support by unincorporated associations, but not corporations or labor organizations, is "closely tailored" to achieve the government's purposes. *CMA v. FEC*, J.S. at A-62, CCH at 51,009. Limits on support for a political campaign were comparable to limits on individual speech affected by the

expenditure limits invalidated in *Buckley*. *Id.* Judge Wallace also found that the impact upon associational freedoms was even more substantial and inhibited the ability of associations to amplify the views of their members. *Id.* at A-64 - A-65, CCH at 51,009-51,010. Then, after reviewing the conference report relied on by the majority and appellees[7] Judge Wallace found that the stated purpose of preventing the funneling of contributions through political action committees was reached elsewhere by the Act, in § 441a(a)(7)(B)(i) and § 441a(a)(8). *Id.* at A-66, CCH at 51,010.

Judge Wallace continued by noting that the majority speculated Congress enacted § 441a(a)(1)(C) ". . . to curb the generalized corruptive threat posed by committees." *Id.* at A-67, CCH at 51,010. Judge Wallace went on to point out that this was pure speculation, without any support in the legislative history. *Id.* at A-68, CCH at 51,011. Citing *e.g., Johnson v. Robison,* 415 U.S. 361, 376-377 (1974), Judge Wallace found that when performing strict scrutiny ". . . a court does *not hypothesize* conceivably governmental purposes in support of challenged legislation." *Id.* at A-68, CCH at 51,011. Even if this purpose was validly considered, Judge Wallace noted that the $5,000 limit on contributions to candidates contained in § 441a(a)(2)(A) prevented the *quid pro quo* arrangements with candidates and that the $5,000 limit on support for a political committee contained in § 441a(a)(1)(C) regulated in entirely different relationship. Thus, Judge Wallace concluded that no significant anti-corruptive objective supported the ". . . substantial infringement on speech and associational rights . . . imposed by the $5,000 limit." *Id.* at A-69, CCH at 51,011.

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[7]H.R. Rep. No. 1057, 94th Cong., 2d Sess. 56-57 (1976).

The Commission does not address these arguments directly but does argue that the $5,000 limit is simply part of a well-balanced, regulatory scheme and prevents corruption. Brief for Appellees at 26-27. It is then argued that since donations to a political committee fall within the statutory definition of contributions and are in some ways consistent with the *Buckley* analysis that such support for a political committee can be limited to $5,000 per year. This argument overlooks the difference in the very nature of contributions to a candidate as compared with contributions to political committees. The latter may merely be for the purpose of sustaining the political committee, such as in the case of the administrative support necessary to establish, administer, and solicit contributions to a political committee. While contributions in the form of cash or certain in-kind contributions may be in turn contributed to candidates, this type of support may also be used to fund independent expenditures. *CMA v. FEC*, J.S. at A-63, CCH at 51,009 (Wallace, J. concurring and dissenting); *see Buckley v. Valeo*, 424 U.S. at 243 (Burger, C.J., concurring and dissenting). Thus, with a more searching analysis, it becomes apparent that support for a political committee serves functions other than funding candidate contributions. Simply arguing that support for a political committee mechanically falls within the statutory definition of contributions is insufficient to extend the rationale justifying the limits on candidate contributions to limits on support for a political committee. The fact that CMA and CALPAC have not during the years in question made independent expenditures to federal candidates is simply not relevant, given the facial analysis applied by the Court below and urged by the Commission in its brief.

The Commission incorrectly characterizes support for a political committee which makes independent expenditures as merely a symbolic expression of support. Brief for

Appellees at 29-30. This interpretation of the activities of political committees ignores the nature and function of political committees under the Act.[8] As noted in *Common Cause v. Schmitt:*

> This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. (emphasis in original.)

Brief of Appellant at A-42.

The right to *effective* association, *e.g., Buckley v. Valeo,* 424 U.S. at 15, is inhibited when administrative support for a political committee can be limited in the same fashion as contributions to a candidate. The rationale justifying a limit on direct contributions and the avoidance of a *quid pro quo* relationship which justified limits on contributions, *Buckley v. Valeo,* 424 U.S. at 26, cannot be so easily extended to the relationship of donor and political committee. This is particularly so when the donor only furnishes administrative support.

The distinction between the relationship of donor-political committee and the contributor-candidate nexus demonstrates that the arguments found sufficient in *Buckley* to sustain the $1,000 limit on individual contributions to candidates, or the $25,000 annual limitation on an individual aggregate contributions are not authority to

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[8]The increasingly significant role played by political action committees in federal campaigns since enactment of the 1974 Amendments is discussed from several perspectives in Symposium, *Political Action Committees and Campaign Finance,* 22 Arizona Law Review, 351-674 (1980). See specific articles cited in Brief of Appellants at 25, n.22; Institute of Politics, John F. Kennedy School of Government, Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act 1972-78,* prepared for the House Comm. on House Admin., 96th Cong. 1st Sess. (Comm. print 1979), cited in Brief of Appellants at 27, n.26.

sustain a limit on support for political committees. The latter is simply not a corollary of the former limitations. The situations where a *quid pro quo* relationship might develop although the donor does not make a contribution directly to a candidate are already regulated by the anti-evasion provisions of §§ 441a(a) (7) and (8). Thus, contributions to a candidate's authorized political commitee; expenditures made in cooperation, consultation or concert with a candidate or his committee; the distribution or republication of campaign materials prepared by a candidate; or earmarked contributions made through an intermediary are all considered as "contributions" for purposes of the Act. In these instances, the donor's actions result in a substantial relationship between the donor and the ultimate beneficiary, a candidate. If a situation described in §§ 441a (a) (7) and (8) is identified, it is appropriate under the rationale sustaining limits on contributions that the transaction be considered a "contribution." The Commission's analysis fails to examine the narrow scope of these anti-evasion provisions, and simply concludes that the broader, all-encompassing $5,000 calendar-year limit established in § 441a(a) (1) (C) is justified by this same rationale. Even assuming a need for additional anti-evasion provisions to supplement the provisions outlined above, the blanket limitation on support for a political committee regulates too broadly, and fails the less drastic means test, *Lamont v. Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring). See Brief of Appellants at 32-40 and Judge Wallace's concurring and dissenting opinion below, J.S. at A-70-A-71, CCH at 51,011. Particularly when analysis is limited to administrative support solely for the purpose of establishing, administering, or soliciting contributions to an unincorporated association's political com-

mittee, the rationale offered to justify the $5,000 limit is insufficient.[9]

The discussion which appears in the Brief for Appellees at 34 to the effect that there are other outlets for political activity by CMA, CALPAC, and their members is largely irrelevant. All of the comments which apply to CMA apply to all other persons, with the exception of corporations and labor organizations. It proves little to state that CMA may contribute $1,000 per election to as many candidates as it chooses, and may contribute $5,000 per year to CALPAC and to other political committees, and may furthermore contribute $20,000 per year to a national party committee. All persons except corporations and labor organizations may make similar unlimited independent expenditures. It proves nothing to state that CALPAC may contribute $5,000 to as many candidates as it chooses per election, $5,000 per year to as many political committees as it chooses and $15,000 per year to national party committees. The same rules apply to all multi-candidate political committees. The Commission goes on to state its concern

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[9]The arguments made by the Commission, Brief for Appellees at 32, that elimination of the $5,000 limit on contributions to a political committee would allow large sums to be channeled to political committees likely to contribute to a particular candidate is, of course, totally inconsistent with the record in this case or the Court's findings of fact in *FEC v. CMA*, Brief of Appellants at A-1. Nowhere is there any evidence to support the notion that CMA makes cash contributions to CALPAC, or makes contributions to CALPAC or any other entity except for administrative support for CALPAC. In any event, as inferred elsewhere in the Commisssion's brief, there would be no incentive for CMA to channel contributions when it could legally make direct contributions itself although such contributions would otherwise be subject to the limits established in § 441a(a).

that members of CMA and CALPAC may individually contribute $1,000 per election to candidates, $5,000 to political committees and $20,000 to national party committees. Again, the same rules apply to all individuals. The executive and administrative personnel of a corporation or the members of a union may all make the same direct contributions. Furthermore, it is not individual political action which is directly at issue here but rather the ability of individuals to associate for effective political action. The Commission's recitation of these provisions confusions the real issues here, which concern CMA's administrative support of CALPAC.

The notion suggested at Brief for Appellees at 35 that individual members of CALPAC can contribute to CALPAC to cover its administrative expenses obscures one purpose of a political action committee. As pointed out in *Common Cause v. Schmitt,* Brief of Appellants at A-33, political committees are "pooling agents." The purpose of these committees is to amplify the voice of their adherents. *CMA v. FEC,* J.S. at A-64, CCH at 51,009 (Wallace, J., concurring and dissenting). Every dollar contributed by a member of CALPAC which goes to administrative costs reduces the ability of CALPAC to participate in the political process. The benefit of receiving administrative support from a sponsoring organization such as CMA helps to make political committees an attractive donee. Contributors would be reluctant to contribute funds for political purposes when a portion of those funds would be used for administrative costs rather than direct political activity. The Commission's arguments ignore the role of political committees as an efficient way to solicit funds and to participate effectively in the political process.

B. Appellees Have Not Demonstrated That the Regulatory Scheme Which Permits Corporations and Labor Organizations to Receive Unlimited Support From Their Political Committees Does not Discriminate Against Unincorporated Associations in Violation of the Fifth Amendment

As pointed out in the Harvard study and the articles contained in the symposium recently published by the Arizona Law Review,[10] participation by political action committees in the process of electing federal candidates continues to increase. Meanwhile, the role of individual contributions and party contributions as a percentage of the total contributions to federal candidates is decreasing. In this milieu it is important that those interest groups design to participate in the political process be permitted to do so in a manner equivalent to other interest groups. Citing the prohibition on direct contributions by corporations or labor organizations, the Commission infers that these entities are precluded from participating in the political process as effectively as an unincorporated association and its political committee. In reality, the proscription of direct contributions merely limits funds available for contributions by the separate segregated funds established by corporations or labor organizations to those funds which are received from voluntary contributions. The Commission argues that there is no limit on direct contributions by an unincorporated association. However, as this Court suggested in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 794, n.34 (1978), it is likely that an unincorporated association will be unable to make significant contributions from treasury funds not specifically contributed for political purposes. The use by an unincorporated association, particularly where membership is voluntary and

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[10]See n.8, *supra*; Brief of Appellants at 25, n.22, and 27, n.26.

not directly linked to employment, of its members' dues for political purposes is likely to result in a loss of membership, with those members withdrawing who do not concur in the political goals of the organization.[11] The use of compulsory dues for political contributions by an unincorporated association would violate the first amendment. *Abood v. Detroit Board of Education,* 431 U.S. 209, 234-235 (1977). Thus it is unlikely that an association will be able to use funds, other than voluntary contributions, for candidate support.

A vital practical question is whether a political committee, be it freestanding or supported by a corporation, labor organization or unincorporated association, can solicit sufficient contributions to be effective. Corporations and labor organizations, and their separate segregated funds, have the advantage in conducting solicitations of unlimited administrative support by the corporation or labor organization. On the other hand, an unincorporated association is limited to $5,000 in annual support and must cover all of its remaining overhead from the voluntary contributions it receives. This limits the ability to solicit and reduces proportionately the political committee's ability to make contributions or independent expenditures, or otherwise participate in the political process. Appellants submit that it is insufficient to merely examine the limits on contributions in assessing the relative position of entities regulated by the Act.

The Commission also argues that greater limits are placed on the solicitation activities of corporations and labor organizations as compared to an unincorporated asso-

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[11]During the period under scrutiny in *FEC v. CMA*, of 25,000 CMA physician members only 7,000-10,000 physicians or their families contributed to CALPAC. Brief of Appellants at A-2. Thus, during this time the majority of CMA members did not contribute to CALPAC.

ciation. While true, as a practical matter it seems self-evident that both corporations and labor organizations have sufficient opportunity to solicit those most likely to contribute; i.e., corporate executive or administrative personnel and their families, or the members of labor organizations and their families. To presume that a membership organization will have substantial success soliciting contributions from nonmembers or individuals not otherwise closely related to the affinity group ignores the proliferation of political action committees.[12] In the final analysis, the Commission argues that unincorporated associations and their political committees are not deprived of equal protection of the law because they are subject to different rules than those which apply to corporations or labor organizations. The argument infers that corporations and labor organizations are subject to more stringent restrictions. The Commission does not, however, mention any example of an unincorporated association which makes substantial contributions to candidates or an unincorporated association which in conjunction with a political committee participates vigorously in the political process by making direct contributions to candidates. From a practical perspective, the key element is not the limit on direct contributions by corporations or labor organizations, or the differing solicitation rules which apply, but instead the total impact of the regulatory scheme which, in this instance, results in political committees supported by unincorporated associations being treated less favorably than committees supported by corporations or labor organizations. Given

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[12]The Commission's Committee/Sponsor Index lists more than 1,000 "non-party related" political action committees ranging from the A&P Better Government Committee (Great Atlantic & Pacific Tea Co. Inc.) to the Zapata Political Action Committee (Zapata Corporation), representing a wide range of interest groups. FEC, *Committee/Sponsor Index*, June 5, 1980.

the strict scrutiny required under the analysis presented in *Buckley v. Valeo,* Judge Wallace was correct in concluding that § 441a(a)(1)(C) when read in conjunction with § 441b (b)(2)(C) is not carefully tailored to achieve the government's legitimate purposes. *CMA v. FEC,* J.S. at A-70-A-72, CCH at 51,011-51,012. As Judge Wallace points out, there is nothing to show that corporations and labor organizations are less likely to use administrative support to circumvent the valid provisions of Act. *Id.* For these reasons the statutory scheme fails to accord appellants equal protection of the laws in violation of the fifth amendment.

CONCLUSION

The Court should exercise jurisdiction under § 437h and answer all of the certified questions in the affirmative. In the alternative, the Court should treat the Jurisdictional Statement as a petition for certiorari, reverse the decision by the majority below and invalidate the $5,000 limit on administrative support by an unincorporated association for its political committee.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT *EN BANC*

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INTEREST OF AMICUS*/

The American Civil Liberties Union is a nationwide, non-profit organization with more than 200,000 members. For more than sixty years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has long been an active participant in litigation involving the constitutionality and interpretation of the federal election laws.

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*/ Letters of consent to the filing of this amicus brief from the attorneys for all parties are being sent to the Clerk of the Court under separate cover.

The ACLU participated in two of the early cases involving the Federal Election Campaign Act of 1971, United States v. National Committee for Impeachment, 469 F. 2d 1135 (2d Cir. 1972), and ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1923) (three-judge court), vacated as moot sub nom.Staats v. ACLU, 422 U.S. 1030 (1975).

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in Buckley v. Valeo, 424 U.S. 1 (1976). Recently, the ACLU served as counsel for two of the defendants in Federal Election Commission v. Central Long Island Tax Reform Immediately Committee , 616 F. 2d 45 (2d Cir. 1980) (en banc), where the Second Circuit unanimously held that certain reporting and disclosure requirements of the Federal Election Campaign Act did not apply to political leaflets that did not expressly advocate

the election or defeat of a particular candidate. At present, the ACLU is providing counsel to one of the plaintiffs in Mott v. Federal Election Commission, 494 F. Supp. 131 (D.D.C. 1980), a case that involves, inter alia, the constitutionality of one of the provisions at issue here, 2 U.S.C. 441a(a)(1)(C).

SUMMARY OF ARGUMENT

2 U.S.C. 441a(a)(1)(C) substantially impinges upon independent electoral advocacy. It restricts the collective political expression that associations such as appellants wish to undertake. And it severely burdens the ability of small groups of individuals that may wish to engage in political advertising in support of particular candidates but independent of these candidates' campaigns. No compelling

governmental interest justifies the regulatory reach of Section 441a(a)(1)(C). Furthermore, the governmental concerns that the provision may have been intended to address are more specifically addressed by other sections of the Federal Election Campaign Act. The statutory provision is, therefore, overly broad and must be invalidated.

INTRODUCTION

In Buckley v. Valeo 424 U.S. 1 (1976), this Court reviewed the constitutionality of various provisions of the Federal Election Campaign Act. The federal statute, as amended in 1974, had imposed, inter alia, a $1,000 monetary limitation upon the amount that an individual could contribute to a candidate or a candidate's authorized campaign committees. It imposed a $5,000 limitation upon contributions by a political committee to a candidate. And it imposed a $25,000 limitation upon the total contributions by an individual during a calendar year.

The statute had also imposed a variety of monetary limitations on the amount that could be spent in connection with electoral contests. Individuals and groups were limited to expenditures of $1,000 "relative

to a clearly identified candidate," even where such expenditures were undertaken independent of the candidate or the candidate's authorized political committees. The personal expenditures of candidates and the families of candidates were also subjected to limitations. And ceilings on overall campaign expenditures were imposed. In Buckley, this Court upheld the restrictions pertaining to campaign contributions and invalidated the limitations imposed upon expenditures.

In response to this Court's decision in Buckley, Congress amended the Federal Election Campaign Act in 1976 to impose new limits on contributions to political committees. Prior to 1976, the contribution limitations imposed by the statute pertained only to donations given either

to the candidate or to the candidate's authorized political committees.*/ The pre-Buckley statute made no effort to restrict contributions to organizations or groups that wished to engage in independent electoral advocacy. However, after this Court's decision in Buckley, the 1976 amendments to the federal statue limited not only contributions made directly or

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*/ Prior to 1976 the contribution limitations were codified at 2 U.S.C. 608(b), which provided in pertinent part:

"(1). . . no person shall make contributions to any candidate with respect to any election for Federal Office which, in the aggregate, exceed $1,000.00

(2) No [multi-candidate] political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000.000 (Emphasis supplied.)"

indirectly to the candidates, but also limited contributions to organizations that engaged in independent expenditures. Specifically, 2 U.S.C. 441a(a)(1)(A) imposed a $1,000 limitation upon contributions "to any candidate and his authorized political committees." Contributions to the "political committees established and maintained by a national political party" were limited to $20,000, under 2 U.S.C. 441a(a)(1)(B). And, pursuant to 2 U.S.C. 441a(a)(1)(C), contributions "to any other political commitee" were limited to $5,000. Because of the broad statutory definition of "political commitee"*/

*/ The FECA defined "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A).

Section 441a(a)(1)(C) of the 1976 amendments thus established a "catch-all" category of political committee, described as "any other political commitee."

Under this catch-all category of "other political committees," Section 441a(1)(c) regulates the activity of groups or associations that essentially function outside the mainstream of particular electoral campaigns. These groups may engage in "independent spending" in support of a candidate.*/ Or these associations may collect funds with a view towards ultimately contributing the funds to particular candidates. But the committees whose

*/ Independent spending or independent expenditures as used here involves the purchase of political advertising in support of a candidate for federal office without any coordination or consultation with the candidate or the candidate's authorized political committees.

contribution solicitation activity is restricted by Section 441a(1)(C) are, in essence, organizations that are independent from any campaign.

This case raises the question whether it is constitutionally permissible for Section 441a(a)(1)(C) of the Federal Election Campaign Act (FECA) to reach beyond the confines of political campaigns and extend its restrictions to the activity of citizens and associations that undertake political associations in a manner that is independent of any political campaigns.

Amicus believes that 2 U.S.C. 441a(1)(C) is unconstitutional in its reach. Because the provision impinges upon core First Amendment activity, it can be sustained only if it advances compelling governmental interests by means least likely to intrude upon the First Amendment freedom to engage in vigorous advocacy

regarding candidates for public office. Amicus concludes that Section 441a(a)(1)(C) is only remotely related to any significant governmental interests and that it is not necessary to meet the governmental concerns against which it was designed to guard, concerns which are already specifically addressed by other sections of the Federal Election Campaign Act.

We believe, therefore, that Section 441a(a)(1)(C) is unconstitutional as applied to the independent electoral advocacy that the instant appellants may wish to undertake. The burden of this amicus brief, however, is to call to the Court's attention a specie of independent electoral advocacy that differs, in some respects, from the variety of political association represented by the appellants here. Section 441a(a)(1)(C) not only restricts the activities of associations

such as the California Medical Political Action Committee (CALPAC), but also the activities of small, ad hoc groups that engage solely in independent expenditures over which the contributors retain substantial personal control. The principal focus of this brief will be upon the constitutionality of §441a(a)(1)(C)'s restrictions on this ad hoc variety of independant electoral advocacy.

ARGUMENT

I. LIMITATIONS ON CONTRIBUTIONS TO SMALL POLITICAL COMMITTEES THAT ENGAGE SOLELY IN INDEPENDENT EXPENDITURES OVER WHICH CONTRIBUTORS RETAIN SUBSTANTIAL CONTROL VIOLATE THE FIRST AMENDMENT.

A. The Reach of 2 U.S.C. 441a (a)(1)(C).

Under the Federal Election Campaign Act (FECA) a political committee is defined as "any committee, club, association, or other group of persons which receives contributions...or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." 2 U.S.C. 431(4)(A).

It follows, therefore, that if two or three persons were to form a group; and if, sharing the same political views these individuals were to draft a political advertisement or advertisements supporting a candidate for federal office; and if, still further, the individuals were to place the

political advertisements that they had drafted in a local newspaper at an expense exceeding $1,000; such a group of individuals would be regarded as a "political committee" under the Federal Election Campaign Act, and subjected to restrictions described in detail infra. Moreover, in the above-described circumstance, these individuals would be thought to have formed a "political committee" even if they were to undertake these electoral expenditure activities in a manner that was entirely independent from and not coordinated with the candidate that they had chosen to support. */

*/ The above-described factual situation is not hypothetical. It describes essentially what Stewart Mott was seeking to do, as set forth in the allegations in his complaint in Mott v. Federal Election Commission, supra. Moreover, the Federal Election Commission's files apparently include several examples of two-person independent spending committees. For instance, two women formed the "Ad Hoc

(fn. cont. on next page)

Having defined the above-described independent, grassroots enterprise as the action of a "political committee," the limitations imposed by the Federal Election Campaign Act upon contributions to "political committees" would be applied. Thus, 2 U.S.C. 441a(a)(1) limits contributions to three categories of political committees: "authorized political committees," (See 2 U.S.C. 441a(a)(1)(A)); "political committees established and maintained by a national political party," (See 2 U.S.C. 441a(a)(1)(B)); and "any

(fn. cont. from preceding page)
Committee Concerned for Life" in order to place an advertisement in the Long Island Catholic, supporting then-Senator James Buckley. Several other examples of two-person independent committees are described in Note, "The Unconstitutionality of Limitations On Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments" 86 Yale L.J. 953, 959, n. 39 (1977).

other political committee," (See 2 U.S.C. 441a(a)(1)(C)). Since the enterprise described above could not be defined as the work of either an "authorized political committee" or a "political committee established...by a national political party," the group would be subject to the limitations imposed by Section 441a(a)(1)(C). That provision effectively prohibits any individual from contributing more than $5,000 to the independent political advertising venture described above.

This conclusion with respect to the application of 2 U.S.C. 441a(a)(1)(C) to the situation described above is reinforced by two Federal Election Commission (FEC) publications. A document entitled Campaign Guide for Congressional Candidates and their Committees (FEC, February 1978), states at p. 8:

> "There is no limit on the amount or frequency of independent expenditures, but they must be reported. However, a group of individuals collectively making 'independent expenditures' which exceed $1,000 in a calendar year would be considered a political committee with registration and periodic reporting obligations. And any contribution to a political committee making independent expenditures on behalf of only one candidate is subject to the per candidate, per election limitations." */ (Emphasis in original).

B. Insofar as Section 441a(a)(1)(C) Applies to the Above-Described Two-Person Spending Committee the Provision Effectively and Substantially Restricts Independent Electoral Advocacy.

As indicated above, Section 441a(a)(1)(C) effectively prohibits any individual from contributing more than $5,000 to an

*/ A September 1978 publication of the Federal Election Commission entitled Bookkeeping and Reporting Requirements Manual for Candidates and Committees at p. 34, recites the same proposition.

unauthorized political committee, such as the sort of small committee that might be formed to undertake independent expenditures. (See description supra, Point IA). This provision therefore substantially and effectively restricts independent electoral advocacy.

First, if the independent political advertising that the above-described two-person spending committee wished to undertake were to cost more than $10,000--as many political advertising campaigns do--such an enterprise would be entirely foreclosed by operation of 2 U.S.C. 441a (a)(1)(C). In this circumstance a full page advertisement in the Sunday New York Times might be foreclosed.

In other instances a wealthy member of a small group might want to undertake independent political spending in

conjunction with less wealthy colleagues who share the same political views. Although the wealthy contributor could spend more than $5,000 if he acted alone, §441a(a)(1)(C) forces him to forfeit his right to associate with others unless he limits himself to a $5,000 contribution. It also would force other less wealthy members of the group to contribute more in order to finance the advertising campaign.

It is thus the case that in the situations described above, Section 441a (a)(1)(C) of the Federal Election Campaign Act severely burdens and, in some instances, absolutely forecloses grass-roots independent expenditure activity by small groups of persons, and severely burdens the right to associate for political purposes.

C. Grass Roots Independent Expenditures of the Sort Described Above Are Entitled to Plenary Protection under the First Amendment. Limitations Upon Such Independent Electoral Advocacy Must be Subjected to Heightened Judicial Scrutiny.

In Buckley v. Valeo, supra, this Court underscored the vitality and importance of independent electoral advocacy. The Court declared, supra at 48:

> "[T]he First Amendment right to 'speak one's mind...on all public institutions' includes the right to engage in 'vigorous advocacy no less than abstract discussion.' [citations omitted] Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage of defeat of legislation."

At the same time, this Court recognized that such electoral advocacy need not be carried out as an individual enterprise.

The Court acknowledged the virtues of collective expression and its capacity to enhance and amplify the solitary voice in the political marketplace. Thus, this Court in Buckley noted that, at the heart of the Court's "recognition of First Amendment protection of freedom of association" was an understanding of the capacity of associative expression to "amplify the voice" of the individual group members. Buckley v. Valeo, supra at 22. The Court cited Sweezy v. New Hampshire 354 U.S. 234 (1957) and NAACP v. Button 371 U.S. 415 (1963) in concluding that the statutory

> "constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'..." Buckley v. Valeo, supra at 22.

While recognizing the virtue of collective expression and its capacity to enhance

the political statements advanced by an individual, the Buckley Court, nevertheless, identified what it seemed to regard as a qualitative difference between expenditures and contributions as they pertained to group expression. The Court noted that the contributor cedes to the candidate or to the candidate's authorized political committee control over what is said. Accordingly, the Court concluded that a contribution, while it may serve as a general expression of the contributor's support for the candidate, only involves speech "by someone other than the contributor." Buckley v. Valeo, supra at 21. And the Court reasoned that restrictions upon contributions were, therefore, only limitations upon symbolic or vicarious speech.

On the other hand, the person who

engages in independent expenditures, retains control over what is said and, therefore, has a more profound interest in the particular expressive activity. Accordingly, the Court concluded, limitations upon expenditures constitute a more direct and substantial impingement upon free expression.

The majority opinion in the Court below relied, in part, upon this distinction between contributions and expenditures. And labeling Section 441a(a)(1)(C) as a "contribution limitation" the lower court upheld its constitutionality. (A-14).*/

But such blind reliance upon labels is misleading. For upon closer analysis it is evident that the line between limitations

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*/ Parenthetical references preceded by the prefix "A" are to the Joint Appendix filed by the parties with the Court.

upon contributions and restrictions on expenditures cannot be so clearly drawn. Thus, for example, where two persons join in the purchase of political advertising that they have jointly drafted, the monetary contributions by each of these persons involves no vicarious speech. Each of the contributors to such a "political committee" personally engages in electoral advocacy. Contribution limitations imposed by 2 U.S.C. 441a(a)(1)(C) impinge directly upon such advocacy.

It thus appears that any substantial restriction upon independent electoral advocacy, whether in the guise of a "contribution limitation"or a restriction upon expenditures can be sustained only if it survives heightened judicial scrutiny. Because 2 U.S.C. 441a(a)(1)(C) poses such

a substantial restriction it must be subjected to rigorous judicial review.

Finally, even if, in some circumstance, there is a sharp difference between the expressive quality of an expenditure and a contribution, amicus contends that contribution limitations as well as expenditure restrictions must be subjected to heightened judicial scrutiny. Amicus reaches this conclusion by examining this Court's opinion in Buckley, where rigorous scrutiny was applied to both the contribution and expenditure restrictions.

The Court prefaced its analysis in Buckley, with the observation that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the

operation of the system of government established by our Constitution." Buckley v. Valeo, supra at 14.

Moreover, an examination of the specific methodology of analysis employed in Buckley reinforces the conclusion that the Court subjected the contribution limitations to heightened scrutiny. The Court began by identifying the fundamental rights that were implicated by the Congressional restriction imposed upon campaign contributions. The Court noted that political contributions represent an important aspect of one's associational freedoms. Id at 22. And it announced that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Id. The Court went on to analyze the governmental interests that were advanced by the contribution

limitations. And after engaging in this analysis it concluded: "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceilings." Id. at 29.

In sum--whether viewed as a contribution limitation or a restriction on expenditures--Section 441a(a)(1)(C) imposes substantial restraints upon independent electoral advocacy, and must be subjected to heightened scrutiny. The statutory provision must be shown to advance compelling governmental interests by means least likely to restrict free expression. Buckley v. Valeo, supra; Dunn v. Blumstein,

405 U.S. 330, 342 (1972); Shelton v. Tucker, 364 U.S. 479 (1960).

D. Section 2 U.S.C. 441a(a)(1)(C) Fails to Advance any Compelling Governmental Interests by Means Least Likely to Intrude Upon First Amendment Freedoms.

Where heightened judicial scrutiny is applied, the statutory enactment under review must be necessary to the advancement of compelling governmental interests. Dunn v. Blumstein, supra. The purposes of Section 441a(a)(1)(C) are discussed in the Conference Committee Report on the 1976 Amendments to the Federal Election Campaign Act. The Report states:

> "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees,... is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions

> to a candidate; second, these limits serve to assure that candidate's reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign."
>
> H.R. Rep. 1057, 94th Cong. 2d Sess. 56-57 (1976); U.S. Code Cong. & Administr. News, 973 (1976).

The first and third of these rationales are essentially the same: The desire to prevent evasion of the candidate contribution limitations. The second putative concern--a desire to insure the reporting of root sources--appears to have no logical connection to the contribution limitations imposed by 2 U.S.C. 441a (a)(1)(C).

With regard to the desire to prevent

evasion of the contribution limitations it is plain that this governmental interest is protected by several other provisions under the FECA's statutory scheme. Thus, 2 U.S.C. 441a(a)(7)(B)(i), provides, in effect, that expenditures that are not truly independent and that are in fact coordinated with a candidate or the candidate's authorized political committee will be treated as a contribution to the candidate.

Similarly, 2 U.S.C. 441a(a)(8) provides that any transfer of funds "in any way earmarked or otherwise directed through an intermediary or conduit" to a particular candidate will be considered a contribution to the candidate.

And the 1976 Amendments contain so-called "non proliferation" provisions which are designed to prevent persons or

organizations from evading the candidate contribution ceilings by the technique of creating multiple "dummy" committees. Thus, 2 U.S.C. 44la(a)(5) essentially provides that all political committees "established or financed or maintained or controlled" by the same corporation, labor organizations or other persons are to be considered a single political committee entitled to contribute only $1,000 or $5,000 to a federal candidate.

With all of these other provisions guarding against the potential evasion of the candidate contribution ceilings it cannot be said that Section 44la (a)(1)(C) is <u>necessary</u> to the advancement of this governmental interest.

In upholding the statutory provision, the majority opinion below attempted to justify its decision by concluding that

the "contribution limitations" imposed by 441a(a)(1)(C) advanced the governmental concern with the corrupting influences posed by political committees. The court below found that the restrictions "prevent the fact or appearance of excessive ties between a committee or its donors, on the one hand, and direct contributions to candidates on the other." (A-17, A-18) But Judge Choy was correct, in the court below, in pointing out that this "anti-corruption" concern cannot be said to justify the instant statutory provision. First, where heightened judicial scrutiny is applied, the actual concerns of the legislature must be examined. Hypothesized, post hoc justifications cannot be proferred in support of the challenged legislation. See Cleveland Board of Education v. La Fleur, 414 U.S. 632, 653 (1974); Vlandis

v. Kline, 412 U.S. 441, 449 (1973). In the case at bar, "anti-corruption" was never articulated by Congress as a basis for the instant statutory provision.

Second, it is likely that the concern regarding corruption was never proferred by Congress as a rationale for Section 441a (a)(1)(C) because the statutory provision addresses the anti-corruption concern only in the most attenuated fashion. Section 441a(a)(1)(C) regulates the relationship between an unauthorized political committee and its contributor. It has nothing whatever to do with the relationship between a contributor and a candidate, or between a contributor and an authorized political committee. The quid pro quo relationships that were the concern of the contribution limitations upheld in Buckley do not spring from the activity that

Section 441a(a)(1)(C) purports to regulate. This section has so little to do with the potential quid pro quo relationships between contributors and candidates that it cannot be found necessary to the advancement of the government's anti-corruption.

Finally the superfluous and anomalous nature of Section 441a(a)(1)(C) is highlighted by the following observation: The provision restricts contributions to political committees that will engage in either of two activities. The committees will undertake independent expenditures. Or the committees will, in turn, contribute their funds directly to candidates or authorized political committees. In the second situation, where the unauthorized committee is, in turn, contributing its funds to the candidate or to an

authorized committee, the provisions of Section 441a(a)(1) and (2) apply and impose limitations on candidate contributions at the point at which the candidate contributions are actually made. In this circumstance Section 441a(a)(1)(C) is, again, unnecessary.

In the first situation, where the committee engages in independent expenditures, the application of Section 441a (a)(1)(C) yields an anomalous result. For in Buckley v. Valeo, supra, this Court held that a committee wishing to engage in independent expenditures could not be subjected to restriction. Yet, Section 441a(a)(1)(C) limits the amount of money that can be solicited by such a committee that wishes to engage in such independent expenditures. As one commentator has

concluded: "If a person's independent speech cannot be restricted constitutionally, neither can his speech through association." Note, "The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments," 86 Yale L.J. 953, 967 (1977).

II. BECAUSE SECTION 441a(a)(1)(C) IS UNCONSTITUTIONALLY OVER-BROAD, THE DECISION BELOW MUST BE REVERSED.

In First Amendment cases involving basic rights of political expression, a statute overly broad in its restrictions must be declared unconstitutional if Congress could achieve its concerns by more narrowly tailored regulations. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963); See also Gooding v. Wilson, 405 U.S. 518 (1972); Village of Schaumberg v. Citizens For A Better Environment, __U.S.__, 63 L. Ed. 2d 73 (1980).

As suggested above, Amicus believes that Section 441a(a)(1)(C) unconstitutionally restricts the associational freedoms of the instant appellants.

However, even assuming arguendo, that the First Amendment is not offended by the application of Section 441a(a)(1)(C) to an association such as the California Medical Political Action Committee, the provision remains unconstitutional when applied to the independent expenditures of individuals of small, ad hoc groups, as described above in Point IA. Because, Section 441a(a)(1)(C) overreaches in its regulatory scope it must be invalidated under the First Amendment overbreadth doctrine. Gooding v. Wilson, supra; Village of Schaumberg v. Citizens For A Better Environment, supra; Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844 (1970).

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals for the Ninth Circuit should be reversed and 2 U.S.C. 441a(a)(1)(c) should be held unconstitutional.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit *En Banc*

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Does section 437h of the Federal Election Campaign Act entitle defendants in a judicial enforcement proceeding brought by the Federal Election Commission to present constitutional claims to an *en banc* court of appeals when the same claims could be raised as defenses in the enforcement proceeding?

2. Does the First Amendment permit Congress to limit contributions of fundraising resources and other administrative support by unincorporated associations to multicandidate political committees in order to prevent circumvention of the per-candidate contribution limits upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976)?

3. May Congress constitutionally limit contributions of fundraising resources and other administrative support by unincorporated associations to related multicandidate political committees while permitting corporations and labor unions, which are prohibited from making any contributions directly to candidates, to contribute unlimited administrative support to their separate segregated funds?

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IN THE

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No. 79-1952

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Appellants,

v.

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Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit *En Banc*

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

INTEREST OF AMICUS

Common Cause submits this Brief Amicus Curiae with the consent of the parties. Common Cause is a nonprofit membership corporation organized to promote, on a nonpartisan basis, its members' interests in civic betterment and electoral reform. It has participated actively in the enactment and implementation of federal election campaign reforms and in litigation concerning them.[1] Common Cause supports the constitutionality of the challenged provisions of the Federal Election Campaign Act of 1971, as amended ("the Act").[2] Common Cause also believes that the special judicial review mechanism established by

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[1] *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

[2] 2 U.S.C. §§ 431-455 (1976 & Supp. III 1979) (and scattered sections of other titles).

section 437h of the Act was improperly invoked in this case.

COUNTERSTATEMENT

The Statutory Scheme

Under the Act, individuals and unincorporated associations may contribute up to $1,000 per year directly to a federal candidate or the candidate's authorized political committees. 2 U.S.C. § 441a(a)(1)(A).[3] Individuals are subject to an annual $25,000 aggregate contribution limit, 2 U.S.C. § 441a(a)(3); unincorporated associations are not. This Court upheld these limitations on contributions in *Buckley v. Valeo*, 424 U.S. 1 (1976).

There are also avenues for making larger contributions. First, Congress provided that individuals and unincorporated associations may contribute up to $5,000 to political committees not affiliated with a particular candidate. 2 U.S.C. § 441a(a)(1)(C).[4] It is the constitutionality of the $5,000 limit that is challenged in this case.

Second, Congress has created a particular type of unaffiliated political committee called the multicandidate committee, which—unlike individuals, associations, or other political committees—may contribute up to $5,000 to a federal candidate. 2 U.S.C. § 441a(a)(2). To qualify as

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[3] The Act defines "contribution" to include "any gift . . . of money or anything of value made . . . for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

A "political committee" is "any committee . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures . . . in excess of $1,000 during a calendar year." *Id.* § 431(4)(A).

[4] Section 441a(f) of the Act prohibits receipt by a political committee of any prohibited contribution.

The legislative history identifies two principal reasons for limitations on contributions to political committees: (1) to prevent circumvention of the limits on direct contributions to candidates and (2) to assure that the Act's disclosure provisions work as intended. H.R. Rep. No. 1057, 94th Cong., 2d Sess. 57-58 (1976).

a multicandidate political committee, a political committee must receive contributions from at least 50 persons and make contributions to at least five federal candidates. 2 U.S.C. § 441a(a)(4).[5] Appellant California Medical Political Action Committee ("CALPAC") is a multicandidate political committee that is "connected" to appellant California Medical Association ("CMA"), a not-for-profit unincorporated membership association comprised of more than 25,000 California physicians. *See* Complaint ¶ 6, Joint Appendix ("J.A.") 6; 2 U.S.C. § 431(7).

An entirely different statutory scheme applies to corporations and labor unions. They may not make contributions to or expenditures on behalf of federal candidates. 2 U.S.C. § 441b. They may participate in the federal electoral process only by establishing and providing "administrative support" to separate segregated funds, 2 U.S.C. § 441b(b)(2)(C), whose activities are themselves closely regulated. *See* 2 U.S.C. § 441b(b)(3). As the parties have used the term in this case, administrative support refers to the provision of such in-kind goods and services (and funds to purchase these goods and services) as assistance in fundraising, office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in setting up and running a political committee.[6]

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[5] In addition, individuals and unincorporated associations may generally make unlimited independent expenditures of their own money to express their own political views. 2 U.S.C. § 431(17). 26 U.S.C. § 9012(f)(1) limits expenditures by political committees to $1,000 where they are made on behalf of a presidential candidate who has opted for public funding under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9042 (1976 & Supp. III 1979). *But see Common Cause v. Schmitt*, No. 80-1609 (D.D.C. Sept. 30, 1980) (3-judge court), *juris. statement filed*, Nov. 25, 1980 (No. 80-847).

[6] *See* 11 C.F.R. § 114.1(b) (1980). Corporations and unions may provide such services without limit for "the establishment, administration and solicitation of contributions to a separate segregated fund." 2 U.S.C. § 441b(b)(2)(C).

Proceedings Against CMA and CALPAC

In October 1978, the Federal Election Commission ("FEC" or "Commission") determined that there was "reason to believe" that CMA had made, and CALPAC had accepted, contributions in excess of $5,000 per year in violation of sections 441a(a)(1)(C) and 441a(f). On April 19, 1979 the Commission concluded that there was "probable cause to believe" that CMA and CALPAC had violated sections 441a(a)(1)(C) and 441a(f) in 1976, 1977 and 1978, *see* 2 U.S.C. § 437g(4)(A)(i), and so advised CMA and CALPAC. On the same day, the Commission voted to commence a federal district court action against CMA and CALPAC to enforce the Act. *See id.* § 437g(6)(A). On May 22, 1979 the Commission filed its complaint for civil penalties and injunctive relief in the United States District Court for the Northern District of California. *See id.*

The Action Under Section 437h of the Act

After the Commission had voted to bring an enforcement action, but before the filing of its enforcement action complaint, appellants filed an action against the Commission under 2 U.S.C. § 437h.[7] Appellants attacked the constitutionality of the provisions of the Act the Commission was seeking to enforce and sought injunctive and declaratory relief; they asked the district court to certify questions for decision by the *en banc* United States Court of Appeals for the Ninth Circuit pursuant to section 437h(a).

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[7] Section 437h(a) provides in part that:

> [A]ny individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Appellants claimed that CMA wishes to provide administrative support to CALPAC in excess of $5,000 per year. Appellants alleged that (1) the statutory limitation on contributions of administrative support impermissibly burdens interests protected by the First Amendment and (2) because corporations and labor unions are free to contribute unlimited administrative support to their separate segregated funds,[8] the Act violates precepts of equal protection implicit in the Fifth Amendment's due process clause. The district court denied the Commission's motion to dismiss and, pursuant to section 437h(a), certified four questions that framed these constitutional claims to the *en banc* court of appeals.[9]

The Ninth Circuit rejected all of the constitutional claims asserted. Relying on *Buckley v. Valeo*, the court of appeals found that the contribution limits impose only inconsequential restrictions on speech interests. The Court observed that these restrictions pale in the light of the "potent alternative means of expression" available to unincorporated associations like CMA. J.S. App. A-15. It noted that CMA and its members may themselves make contributions, *id.* at A-13, as long as the per-candidate and per-committee limits are respected, and that CMA, its members, and CALPAC may make unlimited independent expenditures to express their own views. *Id.* at A-11 to A-12. The court concluded that the limitations are supported by compelling governmental interests that Congress had clearly articulated. *Id.* at A-17.

The court of appeals also rejected the equal protection claim. The court held that the Act does not discriminate against appellants; to the contrary, associations like CMA are favored under the statute and are

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[8] 2 U.S.C. § 441b(b)(2)(C); *see id.* §§ 431(8)(B)(vi), 431(9)(B)(v).

[9] The questions are set out in the opinion of the court of appeals. Appendix to Appellants' Jurisdictional Statement ("J.S. App.") A-2 to A-3 n.1.

free of constraints that apply to corporations, unions, and individuals. *Id.* at A-23.

Appellants now seek to appeal under 2 U.S.C. § 437h(b), and the Commission has moved to dismiss the appeal.[10]

SUMMARY OF ARGUMENT

I.

The courts below should not have permitted CMA and CALPAC to proceed under the extraordinary certified-question procedure provided in section 437h. Appellants could have raised their constitutional claims as defenses in the FEC enforcement proceeding, and section 437h was not intended to pretermit routine FEC enforcement actions. Resort to section 437h was particularly inappropriate here, where an adequate factual record for the resolution of constitutional questions was not available to the court of appeals but could have been developed in the enforcement action.

II.

Appellants' First Amendment claim is without merit. The impact of section 441a(a)(1)(C) on speech interests is negligible. CMA and its members have numerous avenues for communicating their political views. Any "speech" element in contributions of administrative support to a political committee is extremely indirect and attenuated. Section 441a(a)(1)(C) serves the important purpose of preventing circumvention of the per-candidate contribution limits of the Act, which were intended to prevent undue influence and the appearance of undue influence in federal political campaigns and which were sustained in *Buckley v. Valeo.*

III.

Appellants' equal protection claim is also without merit. Given all of the avenues for electoral participa-

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[10] By order dated October 6, 1980, this Court postponed decision as to jurisdiction until the hearing on the merits. J.A. 32.

tion open to CMA, CMA cannot credibly assert that, as compared to corporations and unions, it is disadvantaged or burdened by the statutory scheme. Moreover, Congress chose to exempt administrative support to separate segregated funds because such a fund is the sole vehicle by which a corporation or union may participate in the electoral process, and Congress may have felt that the exemption was a practical necessity if the corporation were to be able to maintain the fund at all. No such similar necessity is present with respect to an unincorporated association and a political committee.

ARGUMENT

I. JUDICIAL REVIEW UNDER THE EXTRAORDINARY PROCEDURES IN SECTION 437h IS NOT APPROPRIATE WHERE JUDICIAL ENFORCEMENT PROCEEDINGS ARE PENDING.

Section 437h, which directs district courts to certify constitutional questions in "appropriate" actions is merely a congressional command for expedition.[11] The statute leaves it to a court to decide whether the actions

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[11] The legislative history of section 437h appears to consist principally of the explanation provided by Senator Buckley in floor debates:

> *It merely provides for the expeditious review of the constitutional questions I have raised.* . . . [I]f, in fact, there is a serious question as to the constitutionality of *this legislation*, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562 (1974) (emphasis added). There is every reason to think that Senator Buckley was concerned only about prompt review of the 1974 amendments in the case he intended to and did bring. *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 385 (1977). Indeed, his reference to "this legislation" literally excludes the provisions of the Act here under review, passed in 1976 after Congress adopted section 437h. At the very least, therefore, section 437h should be read narrowly in all situations not related to the 1974 legislation.

instituted are "appropriate," in light of the nature of review under section 437h and the well-established limitations on the availability of equitable relief in federal courts.[12]

In view of the enormous burdens that expedited *en banc* proceedings impose on a court of appeals, a district court should not deem the case "appropriate" and "immediately" certify constitutional questions under section 437h unless a claimant has shown not only irreparable harm,[13] but also that other remedies are plainly inadequate.[14] In this case, the district court should have granted the Commission's motion to dismiss for want of equity jurisdiction, and should not have certified questions to the Ninth Circuit.

The section 437g enforcement action gave appellants a chance to raise as defenses the very same constitutional claims that they elected instead to pursue under section 437h. Appellants would have been able to litigate such claims in the very same district court where they elected to file their own complaint. Moreover, since section 437g (10) directs that enforcement proceedings be expedited on district court calendars, judgment would have been available at least as soon in the enforcement case as in the section 437h proceeding.[15] In short, whatever impact

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[12] *Clark v. Valeo*, 559 F.2d 642, 661 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *aff'd mem., Clark v. Kimmitt*, 431 U.S. 950 (1977).

[13] *E.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

[14] Even in an ordinary case, the existence of an adequate alternative remedy precludes injunctive relief, *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 772 (1947), and is also a factor that militates against the availability of declaratory relief. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 295-96 (1964); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 133 (2d ed. 1973). *See also Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

[15] In fact, the delays incident to *en banc* procedure in the courts of appeals make it likely that appellate resolution may be available faster in appeals from enforcement actions than in section 437h

the Commission's construction of the statute is alleged to have had on the conduct of CMA and CALPAC could be as readily alleviated in one proceeding as in the other.[16]

Requiring enforcement actions to run their course under section 437g may obviate the need for judicial reso-

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proceedings. *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 384-87 (1977). (To be sure, section 437g actions are not to be advanced ahead of 437h actions on district court calendars, 2 U.S.C. § 437g(10), but the pendency of an enforcement action and an unrelated 437h action before the same district judge is unlikely.)

Indeed, to accept appellants' interpretation of section 437h is to invite enforcement action defendants to delay such proceedings for months by bringing new actions raising constitutional defenses that will have to be resolved before the enforcement action can proceed. That perverse result is contrary to Congress' intent that enforcement actions be speedily concluded and is unnecessary in view of the fully adequate and speedy remedy that section 437g provides to litigants.

[16] *Reisman v. Caplin*, 375 U.S. 440 (1964), and *W.E.B. DuBois Clubs v. Clark*, 389 U.S. 309 (1967) (*per curiam*), are directly in point. In *Reisman*, petitioners brought an action for declaratory and injunctive relief. They claimed, *inter alia*, that IRS subpoenas threatened an unconstitutional search and seizure. This Court ruled, however, that petitioners had "an adequate remedy at law and that the complaint is therefore subject to dismissal for want of equity." 375 U.S. at 443. Petitioners could contest the subpoenas in any action brought by the Secretary of the Treasury in federal district court to enforce them, and all objections thereto, including constitutional objections, could then be interposed and adjudicated. *Id.* at 449-50.

In *DuBois*, petitioners sought a federal court declaration that provisions of the Internal Security Act of 1950 (requiring registration of "Communist front organizations") were unconstitutional under the First Amendment and sought to enjoin enforcement of such provisions before the Subversive Activities Control Board. This Court affirmed dismissal of the complaint. It held that if the SACB subsequently required registration, then petitioners could immediately appeal that order in a federal court of appeals and raise constitutional claims. Given this perfectly adequate remedy, the Court "decline[d] . . . to permit substitution of an injunctive proceeding for the civil proceeding which Congress has specifically provided." *Id.* at 313.

lution of constitutional questions. The enforcement court may rule for the defendant on factual, statutory or other non-constitutional grounds. In such circumstances, dismissal of section 437h complaints best serves the principle "more deeply rooted than any other in the process of Constitutional adjudication that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." [17]

Finally, deference to the enforcement action is especially appropriate, where, as here, there is need to develop an adequate factual record—a process that can be readily accomplished in an enforcement action. For example, to evaluate the strength of the governmental interests that prompted enactment of the provisions in question, it would be useful to know about the roles that political committees and unincorporated trade associations play in federal elections; the extent to which limitations on contributions to candidates can be evaded absent the restrictions in question; and the amounts that corporations and unions expend on administrative support.[18] Thus, here, as in *United States v. UAW*, 352 U.S. 567, 591-92 (1957), adjudication was inappropriate in the absence of a "concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." [19]

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[17] *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). *See also Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[18] *See, e.g., Martin Tractor Co. v. FEC*, 627 F.2d 375, 383-84 (D.C. Cir. 1980) (noting the importance of facts in First Amendment cases).

[19] Appellants' reliance on *Bread Political Action Comm. v. FEC*, 591 F.2d 29 (7th Cir. 1979), in support of the procedure followed below is misplaced. The court of appeals there expressly recognized that enforcement proceedings provide a proper means for obtaining judicial review of constitutional issues. *Id.* at 32-33. The procedure adopted without discussion in *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (*en banc*), on which appellants also rely, is clearly wrong.

II. THE LIMITATION ON CONTRIBUTIONS OF ADMINISTRATIVE SUPPORT TO POLITICAL COMMITTEES IS FULLY CONSISTENT WITH THE FIRST AMENDMENT.

The court of appeals properly rejected appellants' argument that the First Amendment precludes Congress from limiting the administrative support an unincorporated association may contribute to a multicandidate political committee. In *Buckley v. Valeo*, this Court held that reasonable limitations on political contributions are well within the power of Congress. The analysis in *Buckley* is fully applicable to limitations on contributions by unincorporated associations to multicandidate committees.

The *Buckley* Court concluded, 424 U.S. at 20, that because contributions provide financial support only for someone else's speech, a contribution limitation "entails only a marginal restriction" on the donor's First Amendment rights:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. *The quantity of communication by the contributor does not increase perceptibly with the size of his contribution*, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe

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(That case, however, may only stand for the proposition that the district court may—in an extraordinary case and after factual development—certify controlling constitutional issues to a court of appeals (much as they certify all sorts of controlling questions under 28 U.S.C. § 1292(b)), but not that it is required to do so.)

> the contributor's freedom to discuss candidates and issues. . . . [*T*]*he transformation of contributions into political debate involves speech by someone other than the contributor.*

Id. at 21 (emphasis added, footnote omitted). As we show in Part II.A below, this conclusion applies *a fortiori* to contributions of administrative support by an unincorporated association to a political committee: the element of speech by the association and its members is insubstantial.

The justification for limiting such contributions, however, is very substantial. With respect to contributions to candidates, the *Buckley* Court observed:

> It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. . . . To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27. As we show in Part II.B below, the section 441a(a)(1)(C) limitation on contributions to political committees, including contributions of administrative support, is essential to close what would otherwise be a large loophole in the limitations on contributions to candidates. Section 441a(a)(1)(C) is plainly constitutional.

A. The Contribution Limitation in Section 441a(a)(1)(C) Imposes No Substantial Restriction on the Freedom of Expression of CMA and Its Members.

CMA and its individual members have many avenues for political expression. First, both the association and its individual members are entirely free to spend unlimited amounts to express their own political views, including their support for any candidate, as long as the expenditures are independent of the candidate and the candidate's committees.[20] Second, each CMA member may contribute $1,000 in cash (plus certain non-monetary assistance) to each of as many candidates as he or she wishes, 2 U.S.C. § 441a(a)(1)(A), subject to a $25,000 ceiling on annual aggregate contributions. *Id.* § 441a(a)(3). Third, each CMA member may contribute $5,000 to each of as many multicandidate political committees, like CALPAC, as he or she wishes, subject to the same $25,000 annual ceiling. Finally, CMA itself may make the same contributions an individual may make, but CMA is not subject to the overall $25,000 limit.[21]

A primary consideration in evaluating claimed infringements of First Amendment rights is the availability of alternative means of communication.[22] In *Buckley*, the Court found that the existence of alternative avenues of political expression and association counted strongly in the balance when it sustained the $1,000 limitation on

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[20] *See* note 5 *supra*.

[21] CALPAC, as a multicandidate committee, can make contributions up to $5,000 to candidates, 2 U.S.C. § 441a(2)(A), up to $15,000 to national political committees, *id.* § 441a(a)(2)(B), and up to $5,000 to other political committees, *id.* § 441a(a)(2)(C).

[22] *E.g., Pell v. Procunier*, 417 U.S. 817, 823-24 (1974); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 561, 568, 575-76, 579 (1973); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

individual contributions. 424 U.S. at 28. In this case, it is substantially clearer than it was in *Buckley* that appellants have other equally good or better avenues of expression. Indeed, since CMA's members can each contribute $5,000 directly to CALPAC, the whole reason for this case is CMA's quixotic insistence that it, rather than its members, be the donor of funds used for administrative expenses.[23]

CALPAC, the entity to which CMA wants to contribute, apparently engages in no speech or expression of its own. It is merely a conduit for contributions to candidates.[24] Since CMA can contribute directly to candidates and since its members can contribute directly either to candidates or to CALPAC, the limitation imposed by section 441a(a)(1)(C) creates no real restraint on anybody's freedom of expression.

Finally, unlike the contributions at issue in *Buckley*, CMA's contributions of administrative support do not

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[23] The Court in *Buckley* declined to find that limits on contributions to candidates and political committees were unconstitutional in the absence of any "indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21 (footnote omitted). Here, appellants have not even attempted to show that the challenged contribution limitations will have any such "dramatic adverse effect." On its face such a showing would seem impossible to make. Since CALPAC's source of funds for donations to candidates is CMA and individuals who remain free to contribute directly to candidates, the available pool of funds that may be contributed to candidates is not at all diminished.

[24] The complaint makes clear that "[c]ontributions received by CALPAC are, in turn, contributed by CALPAC to candidates for public office, both State and Federal." Complaint ¶ 10, J.A. 8. Although appellants state in their brief that CALPAC "may" make independent expenditures, Brief of Appellants ("Br."), pp. 22, 34, the complaint makes no allegation that CALPAC has made or planned to make expenditures for direct expression.

even symbolically express approval of a particular candidate or of a candidate's stand on any issue. CMA's contributions go instead to a multicandidate committee, which is itself no more than a conduit for contributions; their "transformation . . . into political debate," 424 U.S. at 21, is less certain and far less direct than in *Buckley*. At best, whatever symbolic expression may be accomplished by contributions of administrative support to a multicandidate political committee would not "increase perceptibly" if the statutory ceiling were raised or eliminated. *Id.*[25]

B. The Limitation on Contributions to Multicandidate Political Committees, on Its Face and as Applied to Administrative Support, Is Narrowly Drawn To Serve Compelling Governmental Interests.

The governmental interests served by section 441a(a)(1)(C) are interests that this Court has time and again found to be fundamental.[26] The contribution limitations

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[25] In-kind contributions of administrative support are not entitled to more First Amendment protection than monetary contributions. CMA's admission that "[r]egulation of administrative support has at best a marginal bearing on the use of [contributed] funds in campaigns," Br., p. 33, merely underscores the tenuous connection between administrative support and its transformation into something that CMA wants to say. If CMA cannot make unlimited contributions of office space, clerical services, and postage stamps to a conduit like CALPAC, the only result is that the cost of channeling contributions to candidates through CALPAC may be somewhat increased. But the nondiscriminatory imposition of additional business costs on speech-related activity does not by itself raise a constitutional issue. *See, e.g., Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

[26] Long ago the Court declared that corruption attending "the free use of money in elections" was one of the "great natural and historical enemies of all republics." *Ex parte Yarbrough*, 110 U.S. 651, 658, 667 (1884). *See also Burroughs v. United States*, 290 U.S. 534, 545-46 (1934). Campaign reform laws are intended to preserve the integrity of the electoral and governmental processes—an interest itself close to the heart of First Amendment values, *see*

of the Act are intended to prevent both actual undue influence over elected officials resulting from large contributions that leave officials beholden to the contributors, and the appearance of such undue influence.[27] Like the contribution limits sustained in *Buckley*, the limitations imposed by section 441a(a)(1)(C) are directed at these evils.

1. *The Challenged Limitation Serves Compelling Interests.*

Congressional power to regulate political contributions is not limited to enacting laws that check known instances of improper influence. The *Buckley* Court flatly rejected the contention that effective bribery and disclosure statutes fully satisfy the governmental interest and eliminate the need for prophylactic regulation. 424 U.S. at 27-28. To the contrary, the Court held that, in order to ensure that elected officials do not become unduly beholden to a few large donors, Congress could flatly outlaw *any* contributions beyond $1,000. *Id.* at 30-31.

The *Buckley* Court also squarely held that Congress may reinforce contribution limits by other reasonable restrictions. As the Court said in upholding the $25,000 limitation on annual aggregate contributions, *see* 2 U.S.C. § 441a(a)(3):

> [T]his quite modest restraint upon protected political activity serves to prevent evasion of the $1,000

T. Emerson, *Toward a General Theory of the First Amendment* 103-04 (1966)—and therefore raise "issues not less than basic to a democratic society." *United States v. UAW*, 352 U.S. 567, 570 (1957).

[27] *See Buckley v. Valeo*, 424 U.S. at 26-27; S. Rep. No. 93, 93d Cong., 1st Sess. 1-2 (1973); S. Rep. No. 689, 93d Cong., 2d Sess. 4 (1974); *Hearings on S. 1103, S. 1954, and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 72 (1973).

> contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

424 U.S. at 38.

The history of campaign financing reform shows unbounded ingenuity on the part of those who would shop for political influence.[28] Thus, when Congress amended the Act after this Court's decision in *Buckley*, the possibility of evasion remained an abiding concern.[29] Congress believed it necessary to take additional preventive measures.

Congress viewed section 441a(a)(1)(C) as a necessary loophole-closing provision to ensure that political committees did not become a fulcrum for undue political influence.[30] The Conference Report stated that

> [t]he conferees' decision to impose more precisely defined limitations on the amount an individual may

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[28] *See, e.g., United States v. UAW*, 352 U.S. 567, 570-85 (1957) (describing the massive evasion of the campaign reform statute that preceded the present law); Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 364-65 (1977).

[29] For example, Representative Young told the House that "for years we have heard about the need for campaign reform and for years, the Congress has been passing campaign reform bills with loopholes large enough for the supersonic Concorde." 122 Cong. Rec. 5895, col. 3 (1976).

[30] *See* J.S. App. A-9; *Hearings on S. 2911 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess. 89 (1976) (remarks of Senator Griffin); *id.* at 108-09 (statement of Assistant Attorney General Scalia). *See also* 122 Cong. Rec. 6693-94 (1976) (remarks of Senator Cannon). A provision limiting contributions to political committees, which became section 441a(a)(1)(C), was introduced within a month of the *Buckley* decision. *See* H.R. 12015, 94th Cong., 2d Sess. 24 (1976). *See also* S. 3065, 94th Cong., 2d Sess. 27 (1976).

> contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or a multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.[31]

If there were no limit to the contributions an unincorporated association could give to a political committee, there would be no effective limit on the amount the association could channel to a chosen candidate. Were the association free to give unlimited amounts to a multicandidate committee it could obviously dominate the committee, dictate its policies, and effectively direct the committee to make contributions to any candidate or group of candidates the association chose.[32] And because they are subject to no overall ceiling on aggregate annual contributions, such associations could not only give as much as they want to any one committee, they could give as much as they want to an unlimited number of committees, dominating and directing the contribution poli-

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[31] H.R. Rep. No. 1057, 94th Cong., 2d Sess. 57-58 (1976).

[32] The second consideration cited in the Conference Report—assuring that the disclosure provisions upheld in *Buckley* operate as they were intended—is also a substantial concern. Absent the section 441a(a)(1)(C) limitation, a contribution to a candidate from a CMA-dominated committee would, in practical effect, then be a contribution from CMA. Yet the candidate's reports would disclose only that the multicandidate political committee was contributing money, *see* 2 U.S.C. § 434(b)(3)(B), and CMA's predominant role in the contributions would remain hidden from public knowledge.

cies of them all.[33] Congress was surely entitled to conclude that a line should be drawn at $5,000 in order to forestall such activities. Thus, as the court of appeals recognized, J.S. App. A-12, A-17 to A-18, section 441a(a)(1)(C) is necessary to prevent end runs around the contribution limitations that were upheld in *Buckley*.

The section 441a(a)(1)(C) limitation takes on added importance in the context of contributions to multicandidate committees. Because multicandidate committees are permitted to give up to $5,000 to candidates, Congress took special steps to prevent individuals and associations from evading the applicable $1,000 per-candidate contribution limitations by creating multicandidate committees that were merely their alter egos. To this end, as a condition of multicandidate political committee status, Congress required that at least fifty different persons contribute to the committee.[34] This restriction would become meaningless if, in the absence of section 441a(a)(1)(C), domination could be achieved through unlimited contributions.[35]

2. *Section 441a(a)(1)(C) Is Plainly Constitutional as Applied to Contributions of Administrative Support.*

CMA and CALPAC contend that, "[w]hile it may be argued that a limit on monetary contributions to a po-

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[33] For example, if an association were able to funnel $100,000 to each of ten committees—a $1 million stake in all—it could multiply its contributions to candidates tenfold. This possibility for abuse had been observed prior to the 1976 amendments: "By multiplying support committees, a candidate could receive contributions from the same individual up to the legal limit for each committee." D. Adamany & G. Agree, *Political Money* 45 (1975).

[34] 2 U.S.C. § 441a(a)(4).

[35] Appellants and the *amicus* American Civil Liberties Union ("ACLU") cite other provisions of the Act to show that a "comprehensive anti-evasion scheme" exists apart from section 441a(a)(1)(C). *See* Br., pp. 38-39; ACLU Br., pp. 29-31. But these

litical committee is a necessary feature of the anti-evasion provisions of § 441a," section 441a(a)(1)(C) is unconstitutional as applied to limit administrative support, because "[i]t serves no function reasonably related to valid purposes of the Act." Br., p. 32. This attempt to carve out administrative support as a special constitutional case is without merit.

First, CMA simply errs when it suggests that the anti-evasion and pro-disclosure interests served by section 441a(a)(1)(C) do not apply to contributions of administrative support. CMA can as readily dominate, dictate the contribution policy of, and channel funds through a political committee by giving or withholding unlimited administrative support as it can by giving or withholding money. Indeed, as a developed factual record would have shown, the fundraising, solicitation, and other "administrative" activities that CMA wants to provide take up a significant part of a political committee's resources. Earmarking particular dollars for administration—while CALPAC remains free to make candidate contributions with its other dollars—is a meaningless gesture.

Second, even if CMA's voluntary decision to restrict its CALPAC contributions to administrative support were

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other provisions do not address the particular possibilities for abuse that would arise from removing the ceilings on contributions made to multicandidate committees. If CMA dominated one or more multicandidate committees it would have no need to "earmark" its money and section 441a(a)(8) would prevent nothing; CMA would not have to coordinate any "expenditures" since it would control contributions instead, so section 441a(a)(7)(B) would prevent nothing; and CMA-dominated committees would not require any candidate authorization to evade the limits on contributions to candidates, so section 441a(a)(7)(A) would prevent nothing. Finally, section 441a(a)(5) would require difficult threshold factual findings of "establish[ment]" or "control[]" of dummy committees. Congress has ample latitude to enact effective measures like section 441a(a)(1)(C) that will prevent domination directly at its source.

a meaningful limitation, appellants should not be heard to attack the constitutionality of a federal statute on the ground that their private arrangements have cured the evil at which the statute was aimed. A law prohibiting jaywalking can be constitutionally applied even to people who look both ways before crossing. To hold that any individual or organization may divine for itself the evil at which that limit was aimed, impose use restrictions on its own contributions, and then claim exemption from the limit, would work untold mischief.

Especially in the area of electoral reform "the choice of means to [an] end presents a question primarily addressed to the judgment of Congress." [36] Congress has great latitude in drawing lines. Even statutes touching on First Amendment freedoms can, if justified generally by a sufficient governmental interest, constitutionally reach some cases where the justification is less strong than in others.[37] In *Buckley*, for example, the Court found that the $10 and $100 thresholds for the reporting provisions of the law were "indeed low," 424 U.S. at 83; hardly any $10 contribution carries the seeds of undue influence. Nonetheless, the Court sustained these thresholds because the line was "necessarily a judgmental decision, best left

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[36] *Burroughs v. United States*, 290 U.S. 534, 547 (1934).

[37] *E.g., Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1974) (upholding a blanket prohibition on press interviews in federal prisons and rejecting the claim that interview requests could constitutionally be denied only after an individualized finding that a particular interview would present administrative or disciplinary risks). *See also Procunier v. Martinez*, 416 U.S. 396, 414 (1974); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100-02 (1947). Courts are reluctant to second-guess congressional judgments about where lines should be drawn in regulating the conduct of elections, even when the lines are alleged to impinge on First Amendment or other fundamental rights. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 142-44, 240-49, 278-81, 282 (1970); *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200-02 (D.C. Cir. 1974). *See also* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199, 228-30 (1971).

in the context of this complex legislation to congressional discretion." *Id.*[38]

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[38] Appellants attack section 441a(a)(1)(C) "for the narrow purpose" of vindicating CMA's claimed right to provide unlimited administrative support. Br., pp. 19-20. The ACLU, however, argues an entirely different, and hypothetical, case that touches on the right (not involved here) of individuals jointly to make independent expenditures to express their own political views. The ACLU takes a very restrictive and almost certainly erroneous interpretation of section 441a(a)(1)(C), assuming it would operate to prevent a "two-person independent spending committee" from jointly taking out any advertisement in a major metropolitan newspaper. The ACLU concedes, ACLU Br., p. 14 n.*, that the case it argues is currently on appeal to the D.C. Circuit from the district court's decision in *Mott v. FEC*, 494 F. Supp. 131 (D.D.C. 1980), dismissing the case as not ripe because plaintiff had not first sought the FEC's view of the statute through the advisory opinion mechanism in 2 U.S.C. § 437f. That case, quite obviously, is not the case now before this Court. The certified questions below and here simply do not present the issue that the ACLU argues, *see* J.S. App. A-2 to A-3 n.1, and the issue is no more ripe here than in *Mott*.

Because the activity of appellants is within the "hard core" of conduct that may be regulated, this Court should reject the overbreadth argument made by the ACLU. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Adjudication based on facial overbreadth of a statute is "fundamentally at odds with the function of the federal courts in our constitutional plan," *Younger v. Harris*, 401 U.S. 37, 52-53 (1971), and has been undertaken by this Court "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613. Moreover, Congress provided an advisory opinion procedure, *see* 2 U.S.C. § 437f, which eliminates any chilling effect that the sanctions of the Act might otherwise have, *see Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980), and therefore eliminates any reason for considering any claims of alleged overbreadth.

In any event, the ACLU is altogether wrong in assuming that the FEC would construe the activities of a "two-person independent spending committee" to be a "contribution" to a "political committee." That hypothetical activity does not involve any transfer of control over funds to any organization separate from the contributors. This Court should not explore the far reaches of First Amendment doctrine simply because the ACLU says it can imagine —erroneously—a draconian application of the challenged provision. *Parker v. Levy*, 417 U.S. 733, 760 (1974); *Boyle v. Landry*, 401 U.S. 77 (1971).

III. THE COURT BELOW CORRECTLY HELD THAT LIMITING THE VALUE OF CMA'S ADMINISTRATIVE SUPPORT TO CALPAC DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST APPELLANTS.

Appellants attack section 441a(a)(1)(C) on equal protection grounds, alleging that it denies an unincorporated association like CMA the opportunity to contribute unlimited administrative support to an affiliated political committee, although other provisions of the Act, not challenged here, permit corporations and labor unions to donate unlimited administrative support to their separate segregated funds.[39] The court of appeals correctly rejected this claim.[40] The Act imposes fewer and less onerous restrictions on unincorporated membership associations than on corporations and labor unions. Therefore, as compared to those organizations, the Act does not discriminate against appellants at all.

A. CMA, as an Unincorporated Association, Suffers No Invidious Discrimination Under the Act.

Appellants' equal protection claim must fail because they are not part of a group burdened or "disadvantaged by the classification."[41] They cannot "demonstrate

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[39] Sections 441b(b)(2)(C), 431(8)(B)(vi), and 431(9)(B)(v) exempt from the definitions of "contribution" and "expenditure" the costs incurred in "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). Administrative services, *see* 11 C.F.R. § 114.1(b) (1980), provided by a corporation or labor union to a separate segregated fund thus are not contributions or expenditures.

[40] *See* J.S. App. A-24.

[41] *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). As this Court said in *Califano v. Boles*, 443 U.S. 282, 295 (1979): "In order to make out a disparate impact . . ., it is necessary to show that the

in the first instance a discrimination against them of some substance." [42] When the statutory scheme created by the Act is assessed as a whole, as decisions of this Court require,[43] it is clear that the Act does not burden or disadvantage CMA and CALPAC in their ability to participate in the federal electoral process—it favors them.

Although the value of administrative support provided by an unincorporated association to a connected political committee must be counted as part of the $5,000 limit on contributions, unincorporated associations like CMA have avenues for participating in the political process not available to corporations or unions. They can contribute to candidates and their authorized committees, the political committees of national political parties, and other political committees within the limitations of section 441a(a)(1). Significantly, associations are free to make these types of contributions without any overall cap on the amount that they may contribute, while individuals are limited to an aggregate of $25,000 per year for all contributions.

By contrast, corporations and labor unions may not make any contributions at all. Section 441b(a) states: It is "unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . ." 2 U.S.C. § 441b(a). To ameliorate the force of this restriction, which does not apply to unincorporated associations, Congress gave to corporations and labor unions the oppor-

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class which is purportedly discriminated against consequently suffers significant deprivation of a benefit or imposition of a substantial burden." *See also Zablocki v. Redhail*, 434 U.S. 374, 387-88 & n.12 (1978); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 166 (1977).

[42] *American Party v. White*, 415 U.S. 767, 781 (1974).

[43] *See Williams v. Rhodes*, 393 U.S. 23, 32, 34 (1968); *Buckley v. Valeo*, 424 U.S. at 98-99.

tunity to establish and administratively support "separate segregated fund[s] to be utilized for political purposes." [44]

Against this background, it is difficult to take seriously the claim that appellants are treated less favorably than corporations or unions.

B. Substantial Governmental Interests Support the Different Treatment Accorded Unincorporated Associations.

Even if this Court examines solely those statutory provisions concerning administrative support, rather than the structure of the Act as a whole, there is no equal protection violation. Congress saw substantial reasons for not limiting the amount of administrative support that corporations and unions can give to their separate segregated funds, while imposing such limitations on unincorporated associations. These are more than sufficient to defeat an equal protection attack.

Wishing to "purge national politics of . . . the pernicious influence" of great aggregations of wealth,[45] Congress saw fit to prohibit unions and corporations from using general treasury funds to contribute to candidates or to spend in federal elections.[46] To give corporations

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[44] 2 U.S.C. § 441b(b)(2)(C). The Act strictly regulates the method by and frequency with which the corporation or labor union may solicit contributions for the separate segregated fund. *See id.* § 441b(b)(3), (4), (5), (6). These regulations do not apply to a political committee, like CALPAC, connected to an unincorporated association.

[45] *United States v. UAW*, 352 U.S. 567, 572 (1957).

[46] Congress was also concerned that a shareholder or union member may not hold the same political views as the corporation or union. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 429-31 (1972); 117 Cong. Rec. 43379-81 (1971) (remarks of Representative Hansen offering legislation now codified in much the same form at 2 U.S.C. § 441b(b)(2)(C)).

and unions limited opportunity to participate in federal elections, however, Congress permitted them to establish and administer separate funds, to be financed only from voluntary contributions.

Congress apparently felt that it would not be feasible to limit the administrative support that corporations and unions could give to their separate segregated funds.[47] Given the links between the personnel and resources of the corporation or union and the effective functioning of a separate segregated fund, Congress concluded that "it is not . . . possible completely to separate the resources and facilities made available to the fund."[48] Believing that the support for the services required to administer the fund "cannot be thus readily segregated,"[49] Congress exempted corporations and unions from the $5,000 limit on contributions of administrative support, since, as the court of appeals said, "[w]ithout the exemption for administrative support, corporations and unions simply could not maintain segregated funds." J.S. App. A-23.

By contrast, Congress did not expect that a multicandidate political committee need be so tied to one person, and therefore so dependent upon administrative services, not segregable, from that one person. Indeed, Congress expected just the opposite: under the Act, qualified multicandidate committees are required to receive funds from at least 50 separate sources. 2 U.S.C. § 441a(a)(4).

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[47] *See* 117 Cong. Rec. 43380, col. 3 (1971) (remarks of Representative Hansen); *id.*, at 43384 (remarks of Representative Thompson). *See also Pipefitters Local Union No. 562 v. United States*, 407 U.S. at 418-19, 426.

[48] *See* H.R. Rep. No. 2093, 78th Cong., 2d Sess. 5 (1944). Representative Hansen referred to this earlier legislative history when explaining what is now section 441b(b)(2)(C). 117 Cong. Rec. 43380, cols. 2-3 (1971).

[49] H.R. Rep. No. 2093, 78th Cong., 2d Sess. 5 (1944).

There was no need, therefore, to exempt such committees from restrictions on receipt of unlimited contributions of administrative support. In fact, since Congress intended that multicandidate committees not be dominated by one person lest they become vehicles for evading the per-candidate contribution limits, Congress had strong reasons for its decision not to exempt administrative support contributions by unincorporated associations to multicandidate committees. In addition, given the other avenues of participation, there is no need for anyone, other than corporations and unions, to participate in political activity strictly through another organization or fund.[50]

In view of these substantial differences, Congress was not constitutionally required to take the same approach with unincorporated associations and their related political committees as it took with corporations and their separate segregated funds.[51] *Katzenbach v. Morgan*, 384

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[50] Appellants themselves suggest another sound basis for the different treatment of administrative support. If the costs of establishing and administering a separate political fund or committee are so significant as to affect the ability of the fund or committee to engage in political activity, *see* Br., p. 20, then Congress was completely reasonable in permitting corporations and labor unions, which have no voice in federal elections except through their fund, to bear the costs of operating the fund so that each voluntary contribution to the fund is given to a candidate. *See* 117 Cong. Rec. 43381, col. 1 (1971) (remarks of Representative Hansen); *id.* at col. 3 (remarks of Representative Hays). Just as reasonably, Congress had less need to ensure the maximum effectiveness of the contributions to a political committee connected to an unincorporated association, which can itself make direct contributions and unlimited expenditures.

[51] *Cf. Bread Political Action Comm. v. FEC*, No. 80-1146, slip op. at 16 (7th Cir. Dec. 5, 1980) (*en banc*) ("dissimilar treatment of corporations, labor organizations, . . . and trade associations . . . follows from the rather obvious facts that each of the different groups has a different structure and different kind of constituency"). Laws that treat corporations favorably, like those relating to "limited liability, perpetual life, and the accumulation, distribution, and taxation of assets," *First Nat'l Bank v. Bellotti*, 435

U.S. 641 (1966), for example, involved a challenge to a federal statute that extended the right to vote to all those educated within the jurisdiction of the United States, thus abrogating state English-literacy requirements. Respondents challenged the statute on the ground, *inter alia*, that it violated equal protection principles because it did not also exempt those not educated in American-flag schools from the English-literacy requirement. The Court refused to apply "the closest scrutiny of distinctions in laws" even though the challenged statute involved the right to vote. Instead, it sustained the validity of the statute, because it could imagine a number of factors that "might well have been the basis for the decision of Congress." *Id.* at 657-58. The *Morgan* Court observed that a "statute is not invalid under the Constitution because it might have gone farther than it did," [52] and that Congress may "address[] itself to the phase of the problem which seems most acute to the legislative mind." [53]

This same equal protection analysis has been used to evaluate statutes that may have incidentally implicated

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U.S. 765, 802, 809 (1978) (White, J., dissenting), are embedded in American law; this Court has upheld such laws as long as the different treatment is not shown to be arbitrary or irrational. For example, in *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932), the Court sustained a statute that permitted domestic corporations, but not individuals, to exclude from taxable income any revenue earned outside of the state. The Court refused "to assume that there is no state of facts reasonably to be conceived which could afford a rational basis for" the distinction. *Id.* at 283. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (affirming "the narrow confines of judicial review" applicable to statutory distinctions between corporations and others).

[52] 384 U.S. at 657 (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)).

[53] *Id.* (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)).

First Amendment values by making it easier for some to express their views than others. Thus, in *Buckley v. Valeo*, the Court, quoting *Morgan*, upheld the part of the election laws that provided funding for primary campaigns, even though it was alleged to disadvantage candidates not running in party primaries.[54]

So here, Congress decided to impose a different—and stricter—regime on corporations and unions than on others because it regarded the problems incident to corporate and union activity as more acute. Its decision to "go no farther than it did" and to go "one step at a time" is rationally related to functional differences between corporations and unions and others and is constitutional under *Morgan* and *Buckley*.

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[54] 424 U.S. at 105-06. *See also Taxation With Representation v. United States*, 585 F.2d 1219, 1224 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979) (Congress had "a reasonable basis" for permitting veterans organizations and fraternal societies, but not other charitable organizations, to lobby and still enjoy certain tax benefits, including the right to receive tax-deductible contributions).

Unlike the statutes in *Carey v. Brown*, 48 U.S.L.W. 4756 (U.S. June 20, 1980), and *Police Dep't v. Mosley*, 408 U.S. 92 (1972), the Act does not distinguish on the basis of the content of speech.

CONCLUSION

For the reasons set forth above, if it elects to reach the merits the Court should affirm the judgment of the court of appeals upholding the constitutionality of the Act.

Respectfully submitted,

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